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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 132

SPECTOR MOTOR SERVICE, INC., A CORPORATION,
PETITIONER,

vs.

CHARLES J. McLAUGHLIN, TAX COMMISSIONER,
DENNIS P. O'CONNOR, SUBSTITUTED DEFENDANT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 15, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

SPECTOR MOTOR SERVICE, INC., PETITIONER,

vs.

CHARLES J. McLAUGHLIN, TAX COMMISSIONER, WALTER W. WALSH, SUBSTITUTED DEFENDANT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 62

SPECTOR MOTOR SERVICE, INC., PETITIONER,

vs.

CHARLES J. McLAUGHLIN, TAX COMMISSIONER, WALTER W. WALSH, SUBSTITUTED DEFENDANT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 18, 1944.

CERTIORARI GRANTED MAY 22, 1944.

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

Civil Action File No. 723

SPECTOR MOTOR SERVICE, INC., a Corporation,

v.

CHARLES J. McLAUGHLIN, Tax Commissioner; WALTER W. WALSH, Substituted Defendant

STATEMENT UNDER C. C. A. RULE 13, PARAGRAPH 4

The plaintiff at the time of the bringing of this action was a Missouri corporation, and the defendant, Charles J. McLaughlin, was Tax Commissioner of the State of Connecticut and was succeeded as Tax Commissioner of the State of Connecticut during the pendency of this action by Walter W. Walsh, present Tax Commissioner of the State of Connecticut.

All hearings were had before the Honorable J. Joseph Smith.

There has been a change in the parties to this action in that Charles J. McLaughlin, Tax Commissioner, the originally named defendant, was succeeded by Walter W. Walsh as Tax Commissioner of the State of Connecticut and Walter W. Walsh, Tax Commissioner, was substituted by order of the District Court as party defendant in lieu of Charles J. McLaughlin.

No questions were referred to Commissioners, Masters or Referees.

[fol. 2] The following were the material entries in this case:

1942		
March	9	Summons and Complaint praying for an injunction restraining the defendant from collecting assessments and penalties and for an adjudication as to the liability, if any, of the plaintiff under the Corporation Business Tax Act of the State of Connecticut; further legal or equitable relief; costs and disbursements to the plaintiff.
March	18	Answer filed.
June	15	Amendment to complaint filed.

1942

June 16	Hearing had.
Sept. 3	Motion and order substituting party defendant.
August 27	Brief for defendant filed.
Oct. 28	Application for permission to submit additional evidence.
Nov. 6	Hearing had.
Nov. 13	Opinion filed. Finding of fact and conclusions of law filed. (Smith, J.).
Dec. 21	Judgment filed and entered. (Smith, J.).

1943

Jan. 29	Notice of appeal filed.
Feb. 5	Designation of contents of record on appeal filed.
Feb. 5	Order of Court re withdrawal of Exhibits for Transmission to Circuit Court of Appeals for the Second Circuit filed.
Feb. 19	Petition for an Order Extending Time for Docketing Record to April 30, 1943 filed.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Day, Berry & Howard, plaintiff's attorney, whose address is 750 Main Street, Hartford, Connecticut an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

C. E. Pickett, Clerk of Court, by C. A. Stevens, Deputy Clerk.

Date: March 9, 1942.

[fol. 4] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

723 Civil

SPECTOR MOTOR SERVICE, INC., a Corporation, Plaintiff,

v.

CHARLES J. McLAUGHLIN, Tax Commissioner, Defendant

COMPLAINT

1. The plaintiff is a corporation incorporated under the laws of the State of Missouri and the defendant is a citizen of the State of Connecticut and a resident of the Town of West Hartford in said State. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. This action arises also under the Constitution of the United States, Article I, Section 8, and under Article XIV, Section 1 of the Amendments to the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

3. This action arises also under section 274d of the Judicial Code (28 U. S. C. A., Sec. 400), the parties being of different states, as aforesaid, and the matter in controversy exceeding, exclusive of interests and costs, the sum of $3,000.00.

4. Under the laws of Connecticut, the plaintiff in appealing from the tax assessment hereinafter complained of is precluded from attacking in the State courts the constitutionality of the statute, because the statute which imposes the tax also provides for the appeal and likewise is precluded from availing itself in the State courts of any other [fol. 5] remedy provided by said statute. Under the law of Connecticut the plaintiff is precluded from enjoining in the State courts the collection of said tax assessment.

5. The said statute also provides for severe pains and penalties for the non-payment of said assessment and for the failure returns. The plaintiff has neither paid the tax nor filed returns for the years 1936-1940. The defendant has already made demand for an additional 25% of the total taxes for those years as computed by him as a penalty, together with interest, or a total penalty of $1,672.73,

as of January 7, 1942, and threatens to place a lien on such of plaintiff's property as may be found in Connecticut, all of which will result in a substantial impairment of the plaintiff's interstate business. In addition, the said taxing statute provides that failure to file a return with the defendant for two consecutive years shall cause a forfeiture of the plaintiff's corporate rights and powers.

6. The plaintiff has no plain speedy and efficient remedy at law or in equity in the courts of the State of Connecticut and the collection of said assessment by the means provided in said statute and the imposition of its penalties will result in irreparable harm to it.

7. The plaintiff was incorporated under the laws of the State of Missouri on June 17, 1933, and formerly maintained its principal office at St. Louis, Missouri, but at present maintains it at Chicago, Illinois. At all times it has been and is engaged in the carriage of freight by motor trucks which it leases from others.

8. The plaintiff has for some years past maintained an office and terminal at New Britain, Connecticut, and a terminal at Bridgeport, Connecticut.

9. The business transacted in Connecticut is and at all times has been entirely interstate in character, in that all the facilities of the plaintiff corporation in this state are and have been employed in forwarding freight from points in the State of Connecticut to points outside the State of [fol. 6] Connecticut, or from points outside the State of Connecticut to points in the State of Connecticut.

10. The plaintiff is not and has not been authorized or qualified to carry on an intra state motor carrier business within the State of Connecticut but has been and is authorized to carry on an exclusively interstate motor carrier business through the State of Connecticut.

11. Section 418c of the Cumulative Supplement to the General Statutes, which became law on July 1, 1935, imposed on every corporation "carrying on business in this state" (with certain exceptions not here material) "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state."

12. Purporting to act under said statute, the defendant has assessed the plaintiff the sum of $618.36 as the tax due

from the plaintiff for the year ending May 31, 1936, and the sum of $937.98 as the tax due from the plaintiff for the year ending May 31, 1937.

13. Section 354e of the 1939 Supplement to the General Statutes, which became law on July 1, 1937, imposed on every corporation "carrying on or having the right to carry on business in this state" (with certain exceptions not here material) "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state."

14. Purporting to act under said statute, the defendant has assessed the plaintiff the sum of $1,113.56 as the tax due from the plaintiff for the year ending May 31, 1938, and the sum of $698.94 as the tax due for the six months period ending December 31, 1938, and the sum of $1,407.85 as the tax due for the year ending December 31, 1939, and the sum of $1,346.08 as the tax due for the year ending December 31, 1940.

15. With penalties demanded and interest demanded, the assessments heretofore described aggregate $7,795.50 as of January 7, 1942.

[fol. 7] 16. Said assessments and penalties are illegal and void (1) because they are a burden to and a direct tax upon interstate commerce in violation of Article I, Section 8, and of Article XIV, Section 1, of the Amendments to the Constitution of the United States, (2) because as applied to the plaintiff, they are unfair and discriminatory and in violation of both said constitutional provisions and in violation of Section 1 and 12 of Article I of the Constitution of the State of Connecticut, in that they are based on a computation which disregards one of the plaintiff's major operating costs, to wit: the rental paid by the plaintiff for trucks hired by it from others, (3) because they are not authorized by the statute under which the assessments were purportedly made, and (4) because they are based on inaccurate computations.

Wherefore the plaintiff prays

(1) that the defendant and his agents and subordinates be enjoined from enforcing or collecting said assessments and penalties and from otherwise proceeding against the plaintiff for failure to pay said assessments and penalties

and for failure to file tax returns under the so-called Corporation Business Tax Act;

(2) that an adjudication be had as to the liability, if any, of the plaintiff under the so-called Corporation Business Tax Act;

(3) that the Court grant such other relief, legal or equitable, as may be proper in the premises;

(4) that the court grant a decree of costs and lawful disbursements to the plaintiff.

Plaintiff, by Cyril Coleman, Day, Berry & Howard, Its Attorneys.

Address: 750 Main St., Hartford, Conn.

[fol. 8] In United States District Court

[Title omitted]

Answer—March 18, 1942

1. Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15 of the Plaintiff's Complaint in the above entitled action are hereby admitted.

2. Paragraphs 9, 10 and 16 of the Plaintiff's Complaint in the above entitled action are hereby denied.

The Defendant, by Francis A. Pallotti, Attorney General; Leo V. Gaffney, Assistant Attorney General.

[fol. 9] In United States District Court

[Title omitted]

Amendment to Complaint—June 15, 1942

The plaintiff amends its complaint by substituting for paragraph 16 in its original complaint the following:

16. Said assessments and penalties are illegal and void (1) because they are a burden to and a direct tax upon interstate commerce in violation of Article I, Section 8, of the Constitution of the United States and of Article

XIV, Section 1, of the Amendments thereto, (2) because as applied to the plaintiff they are unfair and discriminatory and in violation of both said Constitutional provisions and in violation of Sections 1 and 12 of Article I of the Constitution of the State of Connecticut, in that they are based on a computation which disregards one of the plaintiff's major operating costs, to wit: The rental paid by the plaintiff for trucks hired by it from others and in that they are assessed unfairly and inequitably on the plaintiff as compared to other persons or corporations engaged in similar or comparable business, (3) because they are made by the defendant, an officer of the executive branch of the State of Connecticut acting in a legislative capacity in violation of Article II of the Constitution of the State of Connecticut and of Article XIV, Section 1, of the Amendments to the Constitution of the United States, in that the statutes complained of delegate to the defendant tax commissioner the power to determine a method of allocation of income arbitrarily as he sees fit, [fol. 10] (4) because they are not authorized by the statute under which the assessments were purportedly made, and (5) because they are based on inaccurate computations.

Plaintiff, by Day, Berry & Howard, its Attorneys.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO SUBSTITUTE PARTY DEFENDANT—September 3, 1942

The plaintiff in the above entitled action represents that Charles J. McLaughlin has resigned his office as Tax Commissioner of the State of Connecticut, and has been succeeded in that office by Walter W. Walsh, a citizen and resident of Connecticut.

Wherefore, the plaintiff prays that an order may enter substituting the said Walter W. Walsh, Tax Commissioner of the State of Connecticut, as party defendant in lieu of Charles J. McLaughlin.

Plaintiff, by Day, Berry & Howard, Its Attorneys.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING PARTY DEFENDANT—November 6, 1942.

Upon the foregoing application, it is hereby ordered that Walter W. Walsh, a citizen and resident of the State of Connecticut, Tax Commissioner of the State of Connecticut, be substituted as party defendant in lieu of Charles J. McLaughlin.

J. Joseph Smith, United States District Judge.

[fol. 13] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

Hartford, Connecticut

Tuesday, June 16, 1942, 3:55 P. M.

Civil Action. File No. 723

SPECTOR MOTOR SERVICE, INC., a Corporation, Plaintiff,

vs.

CHARLES J. McLAUGHLIN, *Tax Commissioner*, Defendant

STATEMENT OF EVIDENCE

Before Honorable J. Joseph Smith, District Judge

APPEARANCES:

For the Plaintiff:

Day, Berry & Howard, Esqs., 750 Main Street, Hartford, Connecticut, by Cyril Coleman, Esq.; Nair & Nair, Esqs., City Hall Building, New Britain, Connecticut, by Israel Nair, Esq.

For the Defendant:

Honorable Francis A. Pallotti, Attorney General, by Leo V. Gaffney, Assistant Attorney General.

Mr. Coleman: Your Honor, I have an amendment to the complaint to file with the clerk or with your Honor as you see fit, and a copy has been given to Mr. Gaffney and he

has no objection, as I understand. (Handing paper to the [fol. 14] Court.) I also am filing at this time a trial memorandum. This is not intended, your Honor, as an exhaustive brief on the case, but I thought it might aid in following the evidence because it has our claims of fact and law briefly set out. (Handing paper to the Court.)

Is your Honor familiar with the pleadings or would you like the pleadings read?

(The Court referred to paper.)

The Court: You may proceed.

Mr. Coleman: Your Honor, I offer as the plaintiff's first exhibit a certificate signed by Chase Going Woodhouse, Secretary of the State of Connecticut, certifying to the qualifications of Spector Motor Service, Incorporated.

Clerk Pickett: Exhibit 1.

Mr. Coleman: I understand there is no objection to it.

(*Plaintiff's Exhibit 1:* Certificate of Secretary of State dated May 26, 1942.)

Mr. Coleman: And I offer, your Honor, as Exhibit 2, photostatic copies of papers filed by the plaintiff in Missouri which is its home, certified copies of those papers under the seal of Chase Going Woodhouse indicating that such papers have been filed also in the office of the Secretary of the State of Connecticut.

(*Plaintiff's Exhibit 2:* Photostatic copy of charter statement and appointment of secretary as attorney, filed June 11, 1934.)

Mr. Coleman: I am offering, your Honor, first of all a temporary permit, issued by the Public Utilities Commission, a certified copy of that permit issued on September 30, 1936. I offer that certified copy.

Mr. Gaffney: The qualifications of the admission that I make, your Honor, are that I have no objection to it being received as a fact of the issuance of the temporary permit, but not for the proof of the facts contained therein.

Mr. Coleman: Your Honor, I do not know just what the limitation means. I claim it for all purposes, as showing [fols. 15] the extent of our legal operation in Connecticut. That is what I claim it for.

The Court: You claim that the extent of the legal operation is in issue?

Mr. Coleman: That is right, your Honor, and on that issue I think this——

The Court: Under the question of tax on the corporation having a right to do business.

Mr. Coleman: That is right.

Mr. Gaffney: There is no doubt about that. Their right to do business in the state is not questioned, your Honor.

The Court: The certificate, however, may be evidence as to that point.

Mr. Coleman: I may say that it is our claim that this certificate, which I am asking to go in, limits our business to an interstate business exclusively, and for that purpose I wish it to go in.

The Court: It may be admitted.

(*Plaintiff's Exhibit 3:* Two sheets, Public Utilities Commission, State of Connecticut, temporary permit TN-2.)

Mr. Coleman: And the same offer for Exhibit 4, which is a permanent permit as distinguished from the temporary permit in your Honor's hand.

The Court: It may be admitted.

(*Plaintiff's Exhibit 4:* Two Sheets, Public Utilities Commission, State of Connecticut, permit N-1093.)

Mr. Coleman: Mr. Fisher, would you take the stand, please?

Simon Fisher, called as a witness on behalf of the plaintiff, being first duly sworn by Clerk Pickett, testified as follows:

By Clerk Pickett:

Q. Your full name?
A. Simon Fisher.
Q. Where do you live?
A. 424 Melrose Avenue, Chicago, Illinois.

[fol. 16] Direct examination.

By Mr. Coleman:

Q. You live in Chicago, Illinois, do you, Mr. Fisher?
A. Yes, sir.

Q. At the present time are you connected with the plaintiff corporation, Spector Motor Service?

A. Yes, sir.

Q. What is your capacity with that organization?

A. I am secretary, treasurer and general counsel.

Q. You have been in the past a lawyer in active practice, Mr. Fisher?

A. Yes, sir.

Q. And as a lawyer in active practice what was your first connection with the plaintiff organization?

A. Well, I represented Mr. Spector personally back as far as 1930, and I originally drew up the partnership papers between him and Mr. Crabbe, who formed the partnership which was the predecessor of this present corporation. I also incorporated the company for them as attorney, drew up all the corporation papers and handled the incorporation of it.

Q. Were you concerned in the drafting of the corporation papers which appear in plaintiff's Exhibit 2 which you have already seen?

A. Yes, sir. Yes, sir, I was.

Q. When did you retire from active practice as a lawyer?

A. Actually actively in June of 1938, although I continued to handle some business in St. Louis up until about February of '39, after my connection with the Company, although it was very minor.

Q. Are you a member of the Bar of the State of Missouri?

A. Yes, sir, I am.

Q. When did you make an official connection as an officer of the plaintiff corporation?

A. In January of 1938 I became secretary of the Company.

Q. From your experience and contacts with the Company, Mr. Fisher, are you of the opinion that you are familiar with its affairs from its inception?

A. Yes, sir, I am.

Q. As the papers before his Honor indicate, the Spector [fol. 17] Corporation was formed as a corporation in what year?

A. In June of 1933.

Q. In June of 1933 when it was incorporated, where was its principal office and place of business?

A. St. Louis, Missouri.

Q. Has there been any change in the intervening years as to the location of the principal office?

A. Well, its principal domicile is still in St. Louis, Missouri. Administrative headquarters have moved to Chicago, Illinois in 1938.

Q. When the corporation was first formed, Mr. Fisher, in 1935, where were its principal sources of business and its principal routes?

A. From St. Louis to New York. That is in 1933?

Q. That is in 1933.

A. From St. Louis to New York.

Q. What type of commerce was engaged in at that time, interstate or intra-state?

A. Interstate. They have never engaged in any intrastate operation of any kind anywhere.

Q. Would you briefly relate to his Honor the expansion of the Company so as to show how its activities came into Connecticut?

A. Well, in the beginning when the operation as we call it—we truckmen call it—was first started, it was essentially a full truckload operation moving so-called perishable freight out of St. Louis, St. Louis being one of the gateways to the West, and South, Southwest, Oklahoma and the other sources of perishable frozen poultry, and eggs and butter, and meat, too, St. Louis itself being an origin point for that type of commodity.

Essentially it was engaged—Mr. Spector was engaged—in the movement of that type of freight both originating at St. Louis and the same type of freight which he received from connecting line carriers coming in from the West at St. Louis to New York, which is the big market for poultry and eggs and butter—was then and perhaps still is—requiring refrigerated trucks. And as the operation grew in volume and the need for better service became apparent, he found that it was necessary for him to find a better type [fol. 18] of equipment and a better type of driver.

There were two ways to get this, first by paying them more money, and second by assuring them of a so-called return load, that is, a return load from New York, on the theory that if they could get back from New York to St. Louis quickly without having to lay around, as they call it, in New York for long periods of time, naturally their personal earning power would be greater.

In addition to that, due to the fact that he was very particular about the type of equipment he wanted, it was necessary to get that, and the field for getting that equipment in those early days was limited. Not having enough capital to purchase that much equipment himself, he naturally had to find it in the hands of the so-called owner-operators or what is sometimes called hired operators.

And it was necessary, in order for him to create a competitive factor with the railroads, who in those early days were almost solely carrying this perishable freight, he found, that he had to get these trucks back to his large source of shipping, St. Louis, as quickly as possible. With that in mind, he tried and he did go to New York and made a contract arrangement, that is, an agency arrangement, with a shipping source. At that time there was a so called Freight Forwarding Company, and since that time they have become according to their own claim before the ICC, common carriers by truck themselves.

I drew that agreement, that is, the agreement upon which they would supply shipping to return to St. Louis, return these trucks to St. Louis.

It did not work out very satisfactorily, so, recognizing the necessity for a two-way haul—and he was one of the pioneers, or really the real pioneer, in the concept of a two-way haul, balanced movement between East and West in the trucking business, in the long-haul trucking business—he went to New York and opened a small terminal and hired [fol. 19] some personnel and I think perhaps a representative there.

Q. What year was that that that terminal was opened in New York?

A. I would say that was along about sometime around either the middle or toward the end of 1933.

Q. Were you running into Connecticut, your Company running into Connecticut?

A. At that time we were not. I would say that at that time there was very little going into Connecticut. It may be perhaps, that there may have been some loads going to Boston, Massachusetts which would require the trucks to pass through Connecticut, but essentially there was no freight being delivered into or originating out of Connecticut at that time.

Q. Now Mr. Fisher, after the opening of the terminal in New York, will you go on with the story of the development of the Company, as running into Connecticut?

A. He knew that much of this freight that now started to return to the West was destined for Chicago and that it was not economic to have the truck going from New York to Chicago loaded and then from Chicago down to St. Louis empty. So he set about creating an origin terminal which was very small then, from Chicago, so that he could have a sort of two-pronged operation. And along about in the early part of 1934 he opened a terminal in Chicago.

In the meantime, one of the reasons for the necessity of this expansion being more or less forced on him, was that there was a very gradual transition taking place in the type of operation from a straight truckload perishable operation to what we call an LTL operation, or an LTL movement which is less than truckload. Of course, under a full truckload operation, terminals were not required because the entire truckload of freight is picked up at the storage plant, or if it is dry freight, so called, at the platform of the shipper, and is delivered directly to the door of the consignee. But on LTL freight, or less than truckload freight, there must be a platform at both the origin point and at the [fol. 20] destination point to consolidate these various small shipments for distribution to various consignees in different parts of the city, if it is a large city, or a large industrial or metropolitan area like New York, or to different points like Connecticut, different towns in an area like Connecticut.

The same thing is true in Chicago and in St. Louis.

Q. After 1934 and the opening of the terminal in New York, was a survey of Connecticut made by your organization through Mr. Spector?

A. Mr. Spector went up there. Of course he would go back and forth in between St. Louis and New York, and on one of the trips that he was in New York he decided to see whether or not he could get some outlet for these trucks. The St. Louis movement was getting movement East, was so much heavier than his possibilities of returning them West, that he thought he would look into seeing if he could not establish another origin point. And he went up into Connecticut, originally intending to make one of these agency arrangements with a local carrier here in Hartford as a source of supply; and then went down to New Britain

feeling that this was a highly industrialized area and that there would be a source of supply.

His original arrangements, and to a great extent that is still true, were with connecting line carriers here in Connecticut who participate in our tariff and who have their own business here and who pick up this freight in various parts of the state, bringing it into our terminal, and they act as the origin carrier and the origin transfer carrier. We reconsolidate the freight at our terminals and move it over our long-haul operation to the West. It is all interstate business, of course.

Q. When was the terminal opened in New Britain, approximately?

A. The New Britain terminal was likewise opened—my best recollection is along about April of 1934, I would say; might have been a little earlier. I think it was around about that time.

[fol. 21] Q. And in opening the terminal did you open the terminal on your own land or on leased property?

A. We leased the terminal.

Q. Was there any connection between your qualifying to do business in the Secretary of State's office as shown by Plaintiff's Exhibit 1 and the lease executed with your landlord in Connecticut? A. Well, the landlord who owned this building at that time knew very little about truckmen and particularly about Mr. Spector and our company, and he insisted that he wanted—since it was a corporation by then—he wanted the Company to be qualified. He would not execute a lease to us, give us a lease, unless we were licensed to do business as they called it, in Connecticut. That was the only reason for securing this license to do business in Connecticut as a foreign corporation.

Q. As a result of qualifying you were subject to the jurisdiction of Connecticut Courts?

A. That is right. That is, apparently, and so he said, that is why he wanted it.

Q. Under your supervision were applications made to the Public Utilities Commission as indicated by Plaintiff's Exhibits 3 and 4?

A. Yes, sir.

Q. Public Utilities Commission of the State of Connecticut, I mean.

A. Yes, sir, they were.

Q. Permits as in the form before you, in your hands, were issued; is that so?

A. Yes, sir.

Q. Did you ever make any application to do an intrastate business in the State of Connecticut?

A. No, sir, we did not.

Q. At my request have you prepared a system map of the Spector Motor Service?

A. Yes, sir.

Q. Was it prepared under your supervision?

A. Yes, sir.

Mr. Coleman: I offer a map here without objection, your Honor.

Clerk Pickett: Plaintiff's Exhibit 5.

The Court: It may be marked.

(Plaintiff's Exhibit 5: Map of plaintiff's terminals, inter-
[fol. 22] mediate points and regular routes in Illinois, Indiana, Ohio, New York, Pennsylvania, Maryland, New Jersey, Massachusetts, Connecticut and Rhode Island.)

By Mr. Coleman:

Q. Now, Mr. Fisher, briefly what does Exhibit 5 contain? What does it show?

A. It is the map of the routes on which the operating authority of Spector Motor Service, Incorporated, as granted by the Interstate Commerce Commission, is based.

Q. Does it indicate the routes over which Spector Motor Service does operate?

A. These are the regular routes over which we actually operate according to the authority of the Interstate Commerce Commission.

Q. Now I notice that the eastern area is sort of blocked in or confined by red lines, and there is a corresponding area in the West which is blocked in by red lines. Would you explain to his Honor what the significance of those red lines is?

A. Well, our operating authority is essentially and solely an East to West movement, and in the converse, a West to East. The red lines on the right are in the East. They define the territory to which and from which we operate from the East to the territory in the West which is within the red lines there, the authority being that we may serve

points in this territory on the one hand, to points and places in the western area as delimited by that red line on the other. We may not serve other points within any of these red lines. We may not serve a point, for instance, from New York to Connecticut, or Connecticut within Connecticut, or Connecticut to Massachusetts. We may serve only points and places in this eastern territory on the one hand, to and from points and places in this western territory on the other hand, using these regular routes to get to and from those points and places.

Q. Just as a matter of curiosity, Mr. Fisher, why it is that the authority limits you so that you cannot furnish delivery freight from New York to Connecticut or Connecticut to New York, but that you must use this East to [fol. 23] West system of transportation?

A. The authority that we have been granted is based on the so-called grandfather rights which are what operation we were conducting on June 1, 1935. And on June 1, 1935 this is the operation we were conducting. We were not serving points and places along the eastern or Atlantic seaboard, but we were serving only points and places within this eastern area to and from points and places within the west. We could not go beyond what we were doing on that date. That is our present operating right.

Q. Under the Motor Carrier Act you were, so to speak, frozen into the type of activity you were doing June 1, 1935?

A. That is right. Under Section 206 of the Federal Motor Carrier Act of '35 we were limited to the operation as a common carrier that we were carrying on on June 1, 1935.

Mr. Coleman: I would like to offer at this time what is called a compliance order, specifically a permit issued by the ICC for the operation of this carrier.

Clerk Pickett: 6.

The Court: Exhibit 6.

(Plaintiff's Exhibit 6: Interstate Commerce Commission, No. MC-69116, Spector Motor Service, Inc., Common Carrier Application.)

By Mr. Coleman:

Q. Briefly, what is Plaintiff's Exhibit 6 which I have called the compliance order, Mr. Fisher?

A. Pardon me, Judge. (Witness referred to paper.) This is an order of Division 5——

Q. Would you let his Honor have the one that is marked and you can have this copy?

A. Yes. This is an order of Division 5 of the Interstate Commerce Commission in which our operating rights as a common carrier under the Federal Motor Carrier Act of 1935, have, as at this time, been defined and our operating authority granted as limited in what is called appendix A attached to the order, appendix A being a description of the regular routes over which we are authorized to operate.

[fol. 24] Q. Does that compliance order, so called, define your rights as you have described them in reference to the red outlined map there?

A. Yes, sir, that is right.

Q. Now I notice on the last page which is the order, Mr. Fisher, the order bears a comparatively recent date, some time in 1942.

A. Yes, sir. That is the date upon which the Commission handed down its decision and this order. This is the result of a series of hearings which have been going on since February—since the date of the filing of the original grandfather application which was February 10, 1936.

Q. Since the filing of your application in 1936, under what authority have you been operating up to the time of the issuance of this compliance order?

A. We have been operating under the authority of the Federal Motor Carrier Act of 1935 and the grandfather clause, so-called grandfather clause thereunder, which provided that if a so-called grandfather application is filed by February 12, 1936, then the carrier has a right to continue the operations claimed in that application until the Commission either denies them or limits them or modifies them.

Q. The compliance order which the ICC has finally issued, can you tell his Honor whether or not that substantially confirms the rights which you have been operating under, under the grandfather clause?

A. Yes, sir, it does, substantially.

Q. At my request did you make or cause to be made under your supervision a series of state maps showing the mileages operated by the Spector Motor Service through those states?

A. Showing the routes and the mileages of those routes through those states.

Mr. Coleman: This is a group. They probably ought to be marked individually.

Clerk Pickett: Exhibit 7-1, 2, 3, 4, 5, 6, 7, 8.

Mr. Coleman: All right.

(Plaintiff's Exhibits 7-1, 7-2, 7-3, 7-4, 7-5, 7-6, 7-7, and 7-8; Eight Spector Motor Service, Inc. mileage maps: Illi-
[fol. 25] nois, Indiana, Ohio, Pennsylvania, New Jersey, New York, Massachusetts, Connecticut.)

By Mr. Coleman:

Q. In the big system map which we put in evidence first, Mr. Fisher, what authority has prescribed the routes which are indicated by that large system map? What authority?

A. The Interstate Commerce Commission.

Q. As to the routes within the individual states, what authority has prescribed those routes?

A. The Interstate Commerce Commission. This is individualizing the routes of the states on here, separating the states.

By the Court:

Q. There is no difference between these individual routes and the map Exhibit 5?

A. No. It is just picking out these separate states and showing them separately on a map, as a state.

By Mr. Coleman:

Q. Showing you the first map of the individual, Connecticut, under your supervision was a computation made of total mileage operated by your Company through the state of Connecticut?

A. Total of the mileages of all the authorized routes, yes.

Q. What is that total?

A. 300 miles approximately.

Q. Is there any other additional information to be gathered from that legend?

A. Well, there are alternate routes of the mileage of certain routes from Bridgeport to New York, not New York City, but to the state line of the State of New York from Bridgeport, and also from New Britain to the Mas-

sachusetts border by various routes over which we are authorized to operate, and from New Britain to the New York state border over the routes which we are authorized to operate.

Q. But the Connecticut routes aggregate 300 miles?

A. 300 miles, yes.

Q. I show you the Massachusetts map of the same series. What is the aggregate of the mileages operated by routes [fol. 26] in Massachusetts by Spector Motor Service?

A. 406 miles. The individual mileages both in Connecticut and Massachusetts are the mileage which we would have to traverse over any of our authorized routes in order to go from our two points or origin, our two terminal points, rather, Bridgeport and New Britain, to the Massachusetts border and to the New York State border.

Q. I neglected to ask you about the institution of a terminal in Bridgeport. When was that opened?

A. The Bridgeport terminal was opened sometime in the latter part of 1934 or perhaps the early part of 1935. Although freight was originating out of there and destined into that point for handling there and distribution, it was done through a so-called agency carrier, and later as business developed, Mr. Spector started the basic process of enlarging it into his own terminal, and sent a man down there, a terminal agent there to handle—who set up facilities, in I think with the Connecticut Transfer Company. They leased us space and office, etc., and agreed to give us space for platform handling. And from that we went into our own terminal as business increased.

Q. Since 1934 how many terminals have you had in Connecticut?

A. Since '34, two.

Q. Two. What other terminal points have you in your system?

A. We have Boston, Massachusetts, Saylesville, Rhode Island, Worcester, Massachusetts now, Springfield, Massachusetts, New York City, Newark, New Jersey, Chicago, Illinois, and St. Louis, Missouri.

By Mr. Gaffney:

Q. Would you repeat those, please, again?

A. Saylesville, Rhode Island, Boston, Massachusetts, Worcester, Massachusetts, Springfield, Massachusetts, New York City——

Q. You say they are terminals there?

A. Yes, terminals. Some of them, like Saylesville and Worcester and Springfield are what we call agency terminals in which we are located in another carrier's terminal. [fol. 27] We do not lease our own terminal there. New Britain, Bridgeport and New York we do.

In Newark, New Jersey, we also have a so-called agency terminal. It is a terminal for all purposes for carrying on our carrier operation with the exception that certain services are performed for us by what we call an agency carrier who provides dock facilities and dock handling, etc.

By Mr. Coleman:

Q. Briefly, what is the function of a terminal?

A. The function of a terminal is primarily to act as an operations unit, to be a point for the origin and destination of freight, to consolidate less than truckload shipments and to have traffic and operations personnel there who will direct the movement of freight to and from that point.

By the Court:

Q. Do you have some of these terminals leased and some owned, do I understand?

A. No, we do not own any.

Q. When you referred to the New York one as owned you meant——

A. No, I said, "Our own terminal". I mean one in which we lease the entire terminal and goods and conduct the entire operation of the terminal ourself.

By Mr. Coleman:

Q. If I may pick up these individual maps again, I show you the map of New York and ask you what is the mileage over which the Spector Motor Service operates in New York State?

A. The regular routes have a total mileage of 775 miles.

Q. Showing you New Jersey, over what mileage does the Spector Motor Service operate in that state?

A. The total mileage of the regular routes in New Jersey is 138 miles.

Q. Pennsylvania, over what mileage do you operate in that state?

A. Total mileage of the regular routes in Pennsylvania is 1382 miles.

Q. And in the state of Ohio, over what mileage do you operate?

A. Ohio is 1210 miles of regular routes.

[fol. 28] Q. And in the state of Indiana?

A. Indiana has 1166 miles of regular routes under our ICC authority.

Q. And in the state of Illinois over what mileage does your Company operate?

A. We have a total mileage of regular routes in Illinois of 1551 miles.

Q. What was that, Mr. Fisher?

A. 1551 miles in Illinois.

Q. Have you at my request——

A. I might if I may be permitted—

Q. Yes.

A. I would like to correct one statement I made as to this system map and our right to serve points within this red area. There is only one exception to that. That is we do have the right to serve Chicago to St. Louis. That was by reason of the purchase of a Chicago to St. Louis operation in 1940. In 1940, August of 1940, we bought a line operating between Chicago and St. Louis. That was not a part of our grandfather application, not a part of our rights that were determined in this compliance order that is in evidence here.

Q. But apart from that one exception, it is the only one?

A. That is the only exception.

Q. At my request did you prepare a schedule of mileages through which your Company operates in the various states, and the percentage which the mileage in Connecticut bears to the total?

A. Yes, sir, I did.

(*Plaintiff's Exhibit 8:* Four sheets re mileage of Spector Motor Service, Inc:)

By Mr. Coleman:

Q. Mr. Fisher, I will hand you another copy and ask you if you will explain to his Honor the significance of Plaintiff's Exhibit 8 (Handing paper to the witness).

A. This is a schedule or chart showing the total mileages of all of our authorized routes in all of the states through which or into which we have a right to operate under our authority. On the first page the individual state

mileages are listed and the total of 7,077 miles is also shown. [fol. 29] In the detail the Connecticut mileage is shown at 300 in accordance with the map that I just described, and the percentage of mileage in Connecticut to the mileage of our regular routes outside of Connecticut is 4.23 per cent. The percentage of the mileage outside of Connecticut to the total mileage is 95.77 per cent. We also have listed on the second page the mileages from New Britain, Connecticut to various service points in what we call the western territory, which is shown on the system map by the red lines. We have in the West in addition to our two terminal points at Chicago and St. Louis, we have certain intermediate service points in the states of Illinois and Indiana. We do not have any rights to serve intermediate points in Ohio or Pennsylvania, that is, in any of the territory that is not within those red lines.

Q. What is the distinction between a service point and a terminal?

A. A service point is one at which merely under our authority we have a right to serve, that is, to pick up or deliver freight, in other words, handle freight in and to or from and to that point but at which we do not have a terminal. One of those points, for instance, is Mishawaka, Indiana, or South Bend, where we either pick up full truckload movements or large shipments of eight, nine, ten or eleven thousand pounds which can be loaded directly from the shipper right onto our over-the-road trailer without the necessity of having to be consolidated on a platform or at a terminal.

Q. First of all, is it permitted under your authority at service points to pick up anything but interstate commerce?

A. No. We have no right to engage in anything but interstate commerce.

Q. Apart from your right, in fact do you engage in anything but interstate commerce?

A. We do not engage in any intrastate commerce anywhere in our system.

Q. Is there any more significant information in that exhibit?

A. The second page has the mileages from New Britain, Connecticut to all their service points in the West, bearing [fol. 30] in mind that we have only one right, to either transport freight from New Britain to these points in the West, or transport freight to New Britain from any of these points in the West, showing the routes, the mileage of the

routes which we would have to use under our ICC authority, and showing the various mileages from New Britain to each one of these points over those routes, with the Connecticut mileage that would have to be used in order to operate from New Britain, Connecticut to the state border, and also showing on each one of those the percentage of the mileage in Connecticut to the total mileage for each one of those trips as you would say. The same type of information is shown on the third page as to Bridgeport, Connecticut, from our terminal at Bridgeport likewise to the various service and terminal points in the West.

And the fourth page shows the same information from Bridgeport to the service points in the West, using the Pennsylvania turnpike. The third page, showing the Bridgeport routes and mileage, uses what we call our southern route using U. S. highway 22. We also have authority to operate over the Pennsylvania turnpike, and in most instances that will cut down the total mileage from point of origin to point of destination, and we showed that on the fourth page. We do not use the turnpike from New Britain. That is only used from Bridgeport to New York, and then to the turnpike.

Q. Does that conclude an explanation of that exhibit?

A. Unless there is any explanation of the figures. I tried to state what it is. I think it is probably self explanatory.

Q. At my request did you prepare a schedule of the names and the duties of the employees of the Spector Motor at the New Britain office at the present time?

A. Yes, sir, I did.

Q. And does that schedule reflect the situation that has obtained in New Britain in the last few years?

A. Yes, comparatively it does.

Mr. Coleman: I offer now, your Honor, a schedule of Spector Motor Employees at New Britain.

[fol. 31] Clerk Pickett: Exhibit 9.

Mr. Coleman: Which exhibit indicates the names and occupations or duties of the seventeen employees at New Britain.

(Plaintiff's Exhibit 9: Statement entitled "Spector Motor Employees at New Britain office".)

Mr. Coleman: And the next, Exhibit 10, is a schedule of the employees at Bridgeport, including their ten names and their duties.

(Plaintiff's Exhibit 10: Statement entitled "Spector Motor Service employees at Bridgeport office".)

Mr. Coleman: And Plaintiff's Exhibit 11, which I now offer, is a schedule showing the percentage of employees in Connecticut to employees outside Connecticut other than over-the-road drivers. (Pause.)

My colleague corrects me. It does not show the percentage. It shows the proportion. The percentage is not exactly figured out.

(Plaintiff's Exhibit 11: Statement entitled "Administrative and terminal employees, Spector Motor Service, Inc., other than New Britain and Bridgeport".)

By Mr. Coleman:

Q. If I show you Plaintiff's Exhibit 11 so that the thing may be entirely clarified, what type of employees are covered by that schedule?

A. These are terminal office employees, what we call administrative and terminal employees, which are office employees and dock hands, and in Chicago and New York the local pick-up and delivery drivers—there are no over-the-road drivers, so called, that is, the line haul drivers, in this list.

Q. The men that are labeled there "dock employees" have nothing to do with shipping, sea shipping or water shipping?

A. No, those are——

Q. That is a name in the trade for——

A. These dock hands, we call our platform—they are more correctly described as our terminal platform; we call [fol. 32] it our dock. It has nothing to do with the harbor docks or something like that. We call them stevedores. Of course these dock hands sometimes are called stevedores, too.

Q. Does the Spector Motor Service own any trucks at the present time?

A. No. Spector Motor Service does not own, has no title to any trucks at the present time.

Q. Has it owned trucks in the course of its existence as a matter of policy?

A. There may have been times when a few trucks were owned, but they were bought for the purpose of resale.

Q. Where are the trucks obtained from, which you use in your operations?

A. Well, from the so-called owner-operators, men who have tractors and trailers of their own, or tractors of their own, and they are lease, so-called leased. An arrangement is made whereby our carrier service is augmented by securing their equipment with the service of a driver and a helper.

Q. Those persons from whom the Spector Motor Service Company leases trucks, includes the Wallace Transportation Company, does it?

A. That is right.

Q. That is one of your lessors?

A. That is right.

Q. The Wallace Transportation Company, what connection has that with officials of your Company?

A. Well, Wallace Transport Company—not Transportation, but Transport Company.

Q. Transport——

A. ——a so-called affiliate—we call it an affiliate—of the Spector Motor, in that Mr. Spector and I and our respective wives personally own all of the stock in the Wallace Transport Company.

Q. In addition to the Wallace Transport Company are there other persons or corporations which lease trucks to your Company?

A. There are other persons, yes. The so-called owner-operators.

[fol. 33] Q. At the present time, is the Spector Motor Company the owner of one or two trucks in New Britain?

A. I think two or perhaps three that are registered in the name of Spector Motor, which are registered in that way in order to comply with the state license regulations of the State of Connecticut, but which actually belong to another person; that is, the person who—one of the individuals who is handling our local pick-up and delivery service for us.

Q. Is the Spector Motor Service holding title under conditional bill?

A. Yes, I would say so.

Q. Now Mr. Fisher, is the Spector Motor Service at the present time the owner of any real estate in Connecticut?

A. No, sir.

Q. During the period that it has operated and maintained terminals in Connecticut has it owned any real estate in Connecticut?

A. No, sir.

Q. Is there a bank account in Connecticut for the accommodation of the New Britain terminal?

A. Not New Britain, but there is one in Bridgeport.

Q. And what is the function of that bank account in Bridgeport?

A. The purpose of it is to deposit each day the cash collections that are made by the drivers on delivery representing the freight charges on so-called driver collects, and so that the funds can be transferred out to the home office in Chicago, which is done by drawing a check to Spector Motor Service, Incorporated, and sent to the home office as a part of the daily receipts.

Q. Such bills as are collected locally for services rendered by Spector Motor Service Company and paid by check, what happens to those checks?

A. Those are sent each day to the home office. The checks are intact and are sent by mail, air mail, special, every night.

Q. And as to the bank account——

A. That is to the home office in Chicago.

[fol. 34] Q. In Chicago. As to the bank account which is maintained in Bridgeport, is there any person in Connecticut with authority to dispense funds for purposes of the maintenance of the business in Connecticut?

A. No, sir. That is limited to only—the transfer of those funds to the home office.

Q. How are bills paid, bills which are incurred in Connecticut?

A. They are paid in two ways. Most of them are paid by checks drawn on the home office at Chicago like utilities bills and rent, etc. And there are some items—well, no bills are paid by draft, but there are some items drawn by draft on the treasurer of the Company at Chicago.

Q. Where is the rating and billing done?

A. All rating, billing and scripting—well, all rating and billing is done at Chicago and St. Louis.

Mr. Coleman: I think that is all at the present time.

Mr. Gaffney: Does your Honor care to adjourn now?

The Court: We will adjourn till 10:30 tomorrow following arraignments in two criminal cases.

(At 5:01 P. M. a recess was taken until Wednesday, June 17, 1942 at 10:30 A. M.)

Hartford, Connecticut, June 17, 1942.

(The trial was resumed.)

SIMON FISHER, a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Mr. Gaffney: Where is the terminal in New Britain?

Mr. Coleman: Before you start cross, I wonder if I could ask the witness one or two more questions which I neglected to ask?

Direct examination (continued).

By Mr. Coleman:

Q. Mr. Fisher, have you any salesmen employed in the State of Connecticut?

A. Well, we have representatives. I suppose in one sense they are called salesmen. They are really repre- [fol. 35] sentatives who call on various shippers and consignees. They are really ambassadors of good will. That is what they are. They have nothing to sell, except to contact various shippers and consignees and develop public relations with the shipping public.

Q. Of course, your organization is a common carrier?

A. That is right.

Q. And as such is obligated to accept freight from any person who desires to ship it and is willing to pay?

A. That is right.

Q. Have you at my request made up a schedule of personal property and equipment in Connecticut?

A. Yes, sir.

Q. And are you familiar with the value of that equipment?

A. Yes, I am.

Q. How did you get your appreciation and your knowledge of its value?

A. Well, the purchasing, all purchasing of all equipment is under my department, the administrative end of the business, and I have had occasion to approve bills for the purchase of various furniture and fixtures over a period of at least four years, for many years prior to that time; also in the course of practicing law in connection with appraisals of estates, bankrupt and probate-court estates.

Q. Now I show you a list which is labeled "Equipment at New Britain". Does that correctly reflect the amount of equipment there located?

A. Yes. This list is taken from our supplies and purchasing department and inventory of equipment and all. Everything is numbered. You will notice numbers on here. Everything is numbered and inventoried.

Q. I show you a second list labeled "Equipment at Bridgeport". Does that correctly describe the equipment that you have there on hand?

A. Yes, that is likewise taken from our records.

(Plaintiff's Exhibit 12: Statement entitled "Equipment at New Britain".)

[fol. 36] (Plaintiff's Exhibit 13: Statement entitled "Equipment at Bridgeport".)

Q. Exhibit 12, Mr. Fisher, is the list of property at New Britain. What in your opinion is the fair value of the equipment there listed?

A. I would say on resale price, present market, anywhere from a thousand to fifteen hundred dollars, possibly.

Q. Of the equipment at Bridgeport what in your opinion is the fair market value of that equipment?

A. That would probably run somewhere I would say in the neighborhood of from $350 to possibly $500.

Q. Yesterday, Mr. Fisher, you spoke of the Wallace Company as being the lessor to you of a number of trucks, the corporation, which as I understood your testimony, was owned by you and Mr. Spector and your respective wives; is that correct?

A. Stock.

Q. The stock in which is owned. Will you explain to the Court the function of the Wallace corporation and the purpose of its existence?

A. The Wallace Transport Company is an Illinois corporation, and it is the equipment-owning affiliate of Spector Motor Service. When we decided that we had to have what we call company-owned equipment and put a part of our operation within somewhat more direct operational control than theretofore, and went out to buy a fleet of equipment, we had organized this Wallace Transport Company and bought all of this equipment in the name of the Wallace Transport.

The purpose was two-fold. First, we are a Missouri corporation. Spector Motor Service is a Missouri corporation. And because of the conflict in the state licensing regulations between Missouri and Illinois, much litigation had been going on. Several injunction suits were filed against the respective states, not by us but by a large group of operators. One group was about sixty-five; we were in the group.

[fol. 37] In addition to that, the fact that while Indiana and Ohio and Illinois had reciprocity between themselves, they did not have reciprocity with Missouri. And, due to this conflict in licensing regulations; unless we would have our trucks registered with Illinois license plates, the weight tax and tire tax in Indiana and the registration tax in Ohio and the flat rate tax in Illinois, would have been so very exorbitant and prohibitive that we could not have operated. And for that reason we worked out, by agreement with the state of Illinois, a licensing of this equipment, and as a matter of fact all of the equipment; even the equipment owned by the so-called hired operators, was also leased to Wallace Transport and subleased under administrative ruling 4 of the ICC to Spector.

But the leasing under the Illinois regulation, licensing regulation, was sufficient to enable them to issue an Illinois license plate. That plate being issued to an Illinois corporation, entitled us to reciprocity through the states of Illinois and Ohio in so far as their weight tax, tire tax and other road taxes were concerned.

Q. The Wallace Corporation was organized under the laws of Illinois; is that right?

A. State of Illinois.

Q. Spector has always been and continues to be a Missouri corporation?

A. That is right.

Q. By having Wallace as the owner of these trucks, as an Illinois corporation, what specific advantage did you obtain?

A. Well, as a Missouri corporation at one time and probably today, we could not—there are two kinds of plates, license plates for trucks in Illinois. There is the mileage plan, which is for weight carrying capacity of our particular trailers, called the T plates. Then there is the X plate, flat rate plan, called the X plate. The T plate is based on 2¢ per mile for every mile traversed in the state of Illinois. As we are situated, the vast proportion of our loads in the West go into and out of Chicago. Comparably, the St. Louis loadings are much lower with the increase of our Chicago business and the growth of the [fol. 38] Company arising out of Chicago, since Mr. Spector moved into Chicago in 1938.

We only run seventeen miles from the Indiana border to our terminal in Chicago, which means thirty-four miles for every round trip, at 2¢ a mile, is 68¢.

Q. That is on the T plates?

A. That is on the T plates. A truck will make about one round trip a week, which will be four and one third round trips a month, which would be about three dollars a month or about fifty dollars a year, while if we had to have the X plate, in other words, if we had the truck registered in the name of a Missouri corporation, Spector Motor, we would have to pay $250 a year for that same truck.

Q. In other words, the more economical plate would not be issued to a Missouri corporation?

A. That is right. And even if it were issued under the reciprocity agreement that Ohio and Indiana had with Illinois, they had a clause in their reciprocity agreement whereby the Reciprocity Commission could go behind the registration and if they felt that the registration was in the name of a resident of a state with whom or with which they did not have reciprocity, they did not have to honor the Illinois registration.

Then, in addition to that, we wanted to have our fleet operation, from the operational standpoint, segregated away from the carrier operation, that is, the traffic operation, so that we could have a definite segregation of operational costs. While Mr. Spector had had at that time

already eighteen or nineteen years of experience in truck operation, he had not undertaken to operate as large a fleet as this in such a short space of time. And in order to get control of the operational costs, we felt that it would be best to have the operation cost in that equipment-owning affiliate. Those were the prime reasons and still are for the Wallace Transport set up.

Incidentally, I might add for clarification that all of the equipment of Wallace Transport is leased to Spector Motor Service as an entire fleet of equipment under the admin- [fol. 39] istrative ruling 4 of the ICC, and the drivers, of course, are, under that ruling, employees of Spector Motor just as they are with the individual hired operator.

Mr. Coleman: I offer at this time the five double sheets which are the assessments issued by the State of Connecticut against the Spector Motor Service. Of course, as I just told Mr. Gaffney, the purpose is to show simply that the assessments were made. We do not, of course, admit that the amounts therein indicated are due.

The Court: It may be admitted.

(Plaintiff's Exhibit 14: Twelve sheets re additional assessments for the years ended December 31, 1940, December 31, 1939, December 31, 1938, May 31, 1938, May 31, 1937, May 31, 1936.)

Mr. Coleman: Your Honor will note, from the statute under which this tax is levied, that the Company is not permitted to deduct from its revenue, from its income, either rent or interest. That is, the base upon which the tax is computed must be its receipts without deduction for such an operating cost as rent or interest.

That leads me to speak to Mr. Gaffney about something that I said this morning, that as a matter of fact the computations which are before your Honor, as issued by the state, do allow as an operational cost sixty per cent of the sums paid to these independent operators. Is that correct?

Mr. Gaffney: That is right.

Mr. Coleman: You may inquire.

Cross-examination.

By Mr. Gaffney:

Q. How many trucks does Spector operate?

A. Tractors and trailer combination outfits, with the Wallace, will run about I would say, around 150, at various times.

Q. How many of those operate in the State of Connecticut?

A. Well, that is hard to say, Mr. Gaffney. They all [fol. 40] come in and go out of the State of Connecticut at some time during the year.

Q. I understood you to say you had three leased terminals, one in New York, one in Bridgeport and one in New Britain; is that correct?

A. That is, in this part of the country, yes.

Q. Where else have you leased terminals?

A. Chicago and St. Louis.

Q. Chicago and St. Louis?

A. Yes.

Q. Well, say——

Q. Your principal place of business is Chicago, is it not?

A. That is right. That is where our largest terminal is.

Q. That is your large terminal at Chicago?

A. Yes.

Q. St. Louis is your home office, is it not?

A. That is right, legal domicile.

Q. Legal domicile and you maintain your warehouse there?

A. We have a terminal there.

Q. Outside of Chicago, your principal place of business, and St. Louis, the home office and legal domicile, you have three other leased terminals, two in Connecticut and one in New York City?

A. Yes, we have other terminals.

Q. Yes, you explained it. But these are leased terminals?

A. That is right.

Q. Your terminal in New Britain is located on Park Street, is it not?

A. That is right.

Q. How big a building is it?

A. I would say it is a building possibly somewhat over a hundred feet long and possibly fifty feet in depth. It is two stories.

Q. Two stories and how many square feet of storage space?

A. You mean dock space? We do not do any storage business.

Q. Well, say——

A. The platform, I would say——

Q. The platform, or inside that might be ultilized for temporary placing of goods in transit, say.

A. Yes. The platform is probably seventy-five feet long and forty feet deep, which would be, well, mathematically —23,000 square feet on the platform—I would say about that.

[fol. 41] Q. Yes, and is there two stories of that?

A. No. The upstairs are the offices and file space, etc. for filing of the local records that they keep.

Q. How about the Bridgeport terminal? How many square feet would you estimate are utilized there?

A. Well, the Bridgeport terminal we just moved, and frankly, while I handled the lease, I do not remember the address. We just moved in the last couple of weeks. I have not seen the terminal yet. I would say, judging from the size of the terminal we just had, and the fact that this is a little bit larger, it is about one-third the size of the New Britain terminal. In around Bridgeport we do not need a platform as large as New Britain because the Bridgeport freight is more in large shipments and truckloads, doesn't hit the dock to the extent that the New Britain freight does.

Q. How about your leases, how long a term are those leases, both for New Britain and Bridgeport?

A. The Bridgeport lease is really not a lease. It is a month to month agreement. I think it has a provision in there that either we or the landlord can, on notice of sixty or ninety days—I don't remember—either we can move out or they can require us to move out. We had a lease at Bridgeport at the place from which we just moved, and when it expired they would not renew it because of present war conditions.

Our New Britain lease was renewed, I believe about a year ago, and I think it is for three years or possibly it is for five. I do not remember exactly.

Q. What is the annual rental?

A. I think our rental at New Britain is either $300 or $350 a month. I would not be too sure of that. I could check it from our records.

Q. Well, if it is different will you let us know, then after you have had an opportunity to check your records?

A. Yes. It is something like that.

Q. What was your rental in Bridgeport at the previous terminal?

A. Well, we have paid $50 a month at one time when [fol. 42] it was smaller, when we were on Kiefer Street. I think we paid a hundred a month in this place from which we just moved. We paid a hundred a month a while, then 200 and then 300 a month. Today our rental at Bridgeport is 250 a month in addition to $75 for the use of a lot and a right of way next to the terminal. The rents have fluctuated and gone up.

Q. That is an additional cost, $75?

A. Plus the 250.

Q. Yes.

A. $50 I think for the lot, and $25 for that right of way, as they describe it.

Q. How many years did you say you have been operating in Bridgeport?

A. I would say that originally an actual operation started in Bridgeport in the terminal of another carrier, here, in the early part of '35. We had been transporting freight, however, in and out of Bridgeport almost as soon as the New Britain operation started, but that freight was brought up by a local transfer carrier from New Haven, Bridgeport, Naugatuck Valley and those places into our New Britain terminal, and there consolidated with other freight and shipped West.

Q. Now it appears from your list of employees on the exhibit in the New Britain office that you have a pretty complete unit there, isn't that so, in New Britain for the purpose of carrying on the business of the Spector Transportation Company?

A. Well, I hope we have a complete unit, Mr. Gaffney. I do not know what you mean by a complete unit. Of course, it is my job to see that all terminals are administered so that they do have adequate personnel. I hope I have done that job.

Mr. Coleman: It is Exhibit 9, your Honor.
Mr. Gaffney: That is right. I have it right here.

By Mr. Gaffney:

Q. You have a manager in charge of the eastern division located in New Britain, Mr. Spector?

A. Mr. David Spector.

Q. What are his duties?

A. His duties are supervisional; in so far as the New Britain terminal is concerned and its functions, he super- [fol. 43] vises the management, and when we say management, that has reference to operations and traffic and the administration, sales, etc.

Q. Is he a sales solicitor?

A. No. He does not do any soliciting at all.

Q. Who does the sales soliciting in New Britain?

A. Well, we have Mr. Art Heelzer. I don't know—It is a very indefinite term in the trucking business—whether you can say a man does sales soliciting. He stands, perhaps, in the same relative position that a salesman would stand in a commodity business, if he had a specific commodity to sell. But his technique, like all of the salesmen, must be, since he is dealing only in creating the desire in some one, not to buy anything from us but to utilize the service that we perform, his technique is just to create that desire by things that he does and says.

Q. Will you explain exactly how a terminal operates? In other words, does your salesman go out or your solicitor go out and solicit orders from the factories in the State of Connecticut when they want to transport some goods west?

A. No, sir, a solicitor does not. That is, for instance, take one shipment, let us say, from Fafnir Bearing Company, let us say of 9,000 pounds, originating in Connecticut. No one goes out to Fafnir Bearing and takes an order for the shipment of 9,000 pounds. We are just like —in that respect, we are a common carrier and stand in the same shoes, in that respect, as a railroad. Fafnir Bearing knows either because someone has told them or perhaps one of our people, our terminal manager, one of our drivers, one of our so-called representatives, solicitors or salesmen, whatever you would call them, that Spector Motors serves certain points. Fafnir Bearing may want

to send that shipment to Chicago or some point in Iowa or Bremerton, Washington. And the traffic manager and shipping clerk—I just happened to pick that name—may not know whether or not Spector Motor serves that point. [fol. 44] They will do one of a number of things. They may pick up the phone and call Spector Motor terminal and say, "Do you serve Ottumwa and how shall I route it?"

We tell them we only go to Chicago, Illinois.

They will ask, "How shall I route it?"

And whoever answers that phone, maybe a pick-up clerk or our rate man or anyone there, might tell them to route it to Spector Motors to Chicago, and Reliable Transit from Chicago to Ottumwa.

They then make out a so-called shipping order, a uniform shipping order or bill of lading and ask us to make the pick-up. The truck is sent over there and the freight is picked up. It is sometimes left on the trailer and other freights put on the *that* trailer and it goes off to the West.

Q. You are not passing up any business, are you?

A. Passing up any business? No, we are not permitted under the law to pass up business.

Q. You would like more business if you can get it?

A. We would like to have as much business as possible.

Q. And the solicitor, so called, one of his jobs is to try and increase the business, is it not?

A. That is true.

Q. All right. So he brings it to the attention of the Royal Typewriter and Pratt & Whitney and Aircraft and other factories, that you are in business to serve.

A. Yes.

Q. He may be in the home office when he gets a call?

A. The home office?

Q. The New Britain branch, I might say.

A. No. He does not get calls. That is not his job. His job is just to go out and just keep circulating around, either by making direct calls on the traffic managers, the shipping clerks, leaving them lists of points, answering their transportation problems, or meeting them at traffic clubs, or taking them out to lunch, or making social or personal contacts and talking up Spector Motor Service as much as he can.

[fol. 45] Q. All right. Now in a so-called order, when a company in Connecticut wants to ship West and they con-

fact whoever is the representative in New Britain, then what happens physically? Is a truck sent up to pick up their order and deliver to New Britain or what?

A. They do not contact a representative. They make what is called a pick-up call. With many of our shippers here in this area they have what we call regular pick-ups. Some of them will ship daily and a truck calls there daily. Some of them will ship once a week. Every Wednesday they have a shipment of approximately the same amount. If it is a small amount the little pick-up truck calls. If it is a large shipment, some of them ship 10 or 12 or 16,000 pounds at a time, which is at least a full truckload, and the road trailer will make the call.

Now the traffic department of the terminal, that is the dispatcher and the pick-up clerk, etc., they have the list of these daily calls. Most of the calls, as a matter of fact in Connecticut, Mr. Gaffney, are regular recurring daily calls.

Q. The point I am trying to get at is the picture of your operation. They call or they have regular calls, and these truckers come and they bring the goods down to the New Britain terminals.

A. What do you mean these truckers?

Q. Well, do you pick them up out of your own trucks?

A. Some of them are our own trucks. These large shipments, the road driver goes out and makes the pick-up in many cases. Then we have local cartage pick-up and delivery service as a part of our line-haul service through local cartage men whom we pay so much a hundredweight for the purpose of handling this local cartage service.

Q. Very well. Then either through the local cartage men or through your own trucks, the goods are brought to that New Britain terminal, are they not?

A. That is true, yes.

Q. When you have got sufficient goods to fill up a truck full, then a truck is dispatched. Isn't that about——

A. No, sir.

Q. All right. Then you sort it out——

[fol. 46] A. It is placed on the platform and sorted according to the destination points, and sometimes according to the commodity, according to the size of the shipment. If it is a large shipment and it can be made at destination direct from the trailer without hitting the destination dock, then miscellaneous shipments are placed in front of the

trailer, the large shipment at the rear end of the trailer, so that the road driver can make the delivery. The same is true of the pick-up here. In other words, they may have going to Chicago, let us say, 5,000 pounds of miscellaneous freight on a Tuesday. And on Tuesday they know that they have a regular pick-up from a particular shipper here, Pratt & Whitney, let us say, that usually runs between 15 and 17,000 pounds. They will load the nose of the trailer with the 5,000 and send that road driver over to Pratt & Whitney to put the 15 or 17,000 pounds on the back and it goes right from there off to——

Q. I see. Then the pick-up is made either through your own truck at the factory or through these trucks——

A. Or through a truck that we control through arrangement with them. We must control them under the ICC regulations.

Q. Your own truck may possibly, if it is a sufficiently large load, go right out on its route. Otherwise the goods are carried back to the New Britain terminal and are sorted?

A. That is right, on the platform.

Q. According to size and perishability, and they are shipped out?

A. Loadability.

Q. How long are they kept at the New Britain terminal? Not longer than thirty-six hours, I take it.

A. They are not even kept that long. Right now under the new ODT order, general order no. 3, we will not be permitted to keep any shipment in our terminal over thirty-six hours. It would be a violation. A pick-up is made during the day. It is sorted out on the platform, even those that are made in the evening, and that truck goes out sometime between the time it is picked up, sorted out, and one or two o'clock in the morning. It is on the [fol. 47] road. It does not stay. It does not rest here at all, does not come to rest at all for any purpose other than putting into the trailer.

Q. The goods that are picked up in the lower part of the state down around Fairfield County, are first brought to the Bridgeport terminal, are they not?

A. That is right.

Q. And brought from the Bridgeport terminal to the New Britain terminal?

A. No.

Q. For sorting?

A. Oh, no. Bridgeport operates——.

Q. Independently now? I see.

A. Once in a while you might have, if they are short of equipment in Bridgeport and they have some space in the trailers in New Britain, and the reverse sometimes is true—rather than hold freight over a day, they will move it up to New Britain or down to Bridgeport from New Britain to dispatch it expeditiously. That is very rare and that is the exception.

Q. Your Company was formed in 1933?

A. It was incorporated then.

Q. Incorporated. And it has prospered since that time, has it not?

A. Yes, sir, it has.

Q. Can you tell us year by year the gross operating income of the Company?

A. The operating income or the gross receipts?

Q. Well, both if you can do it.

A. Well, of course that would call for a better memory than mine. In 1932 they were working on a little different basis with these hired operators than later. I would say that the net operating income at that time was possibly—or the gross——

Q. Gross I am asking for.

A. Well, it depends upon an interpretation of the words. The gross that was put on the books at that time I would say was possibly 5 to $6,000 a month, but it was put on the books on an entirely different basis than today. It was put on, net of everything that was paid out, so that would be net operating income. From that——

[fol. 48] Q. I am not too interested in '33. Let us get up to these tax years of '36 on.

A. In '36 I would have to look at the record.

Mr. Coleman: We have them all here. The accountant——

The Witness: (Interrupting.) The general ledger gives the revenue. In 1938 I believe the revenue—I think the revenue was something like 500 and some odd thousand dollars.

By Mr. Gaffney:

Q. All right. Stop right there just a minute.

A. I think it was. I don't know.

Q. What percentage of that gross revenue did Connecticut business bear?

A. That you would have to ask Mr. Arnold. I do not remember those figures because I do not concern myself with them until I become interested in a particular problem involving them, and I do not really remember.

Q. Do you know whether it was fifty per cent?

A. Another thing, it is hard for me to answer that because I do not know what you mean by Connecticut business. We do not have any such thing as really Connecticut business. Business originating out of——

Q. Business originating in Connecticut.

A. I think possibly in '36——

Q. '38 we are talking about.

A. '38. I would say at that time, possibly '38, business originating out of Connecticut in '38 to the gross receipts might have been around twenty-five per cent. I wouldn't know, Mr. Gaffney. We have got the records here and we can tell you.

Q. As a matter of fact, it was better than fifty per cent, was it not?

A. Might have been. I do not really remember. I cannot remember those figures.

Q. All right. Well, forget that line of questioning for the moment.

You have seventeen employees located at the New Britain terminal office. Are most of those employees local people?

A. Oh, they all live in Connecticut, New Britain, Newington and around Hartford. Mr. David Spector lives in Hartford.

[fol. 49] Q. The payroll amounts to how much per week?

A. New Britain terminal payroll with dock, oh, I guess somewhere around $1200 a week, possibly a little more, possibly a little less, I would say.

Q. How are they paid?

A. They are paid by a draft which they draw on the treasurer of the Company at Chicago. We have a draft system. All terminals draw a draft on the treasurer of the Company and they pay—all terminal payroll is paid in that way.

Q. Is the same true with the Bridgeport terminal?

A. Yes, they draw a draft on the treasurer of the company.

Q. You said you pay no local taxes in the nature of property taxes at all.

A. Yes, I think we pay to the City of New Britain.

Q. City of New Britain, a personal property tax, is that it, on the desks and furniture?

A. I think so.

Q. How much of a personal tax is that?

A. I do not know. They tell us it is around forty, fifty or sixty dollars.

Q. Your accountant would be able to tell us about that?

A. Yes. There are some things about the Company that I do not know, Mr. Gaffney. I frankly confess that.

Q. Your bank accounts, you keep one in Bridgeport and one in Chicago, is that right?

A. We have a bank account in Chicago that is our primary bank account. That is where the funds of the Company are deposited for the purpose of handling the business of the Company. We have a bank account in St. Louis, too, but the bank account in St. Louis is in the same relationship as the one in Bridgeport. All they can do is deposit. In St. Louis no one has authority to draw any checks against that account for any purpose. We draw the checks at the home office for the purpose of transferring the funds into the Chicago account. I think we just recently opened a bank account in New York, also, to handle the cash collected by the drivers, and they have the authority to deposit that money in the New York bank account, draw a check [fol. 50] for the amount of the day's collections, and send that check in to the home office. A transfer account only.

Q. Your rent is paid for the New Britain terminal by a check drawn on Chicago?

A. No. The rent is paid by a check drawn at the home office and forwarded here direct to the landlord here or to the New Britain office, and sent to him.

Q. And your payroll is paid by home office check, is that right?

A. Payroll is paid by draft which they draw themselves.

Q. Who draws?

A. The office, the New Britain office draws the draft. They have a regular payroll set-up. We have a definite schedule of pay, and they know what their salary is, and the overtime work. We get payroll reports.

Q. That operation of drawing a draft to pay the local employees is performed in New Britain?

A. They draw a draft.

Q. On a foreign bank?

A. It is not drawn on a bank. A draft is drawn by someone authorized in New Britain to sign drafts. There are three people in New Britain who may sign drafts. They draw a draft payable—it is a voucher draft payable to the order of the employee for that employee's salary for the previous week. Payrolls are made, I think on Tuesday, that is, payroll is paid on Tuesday for the previous week ending Saturday. On the voucher at the bottom it will state the amount of payroll, the social security, and the net amount of that draft. That draft is drawn on the treasurer of the Company who happens to be me.

And it clears through our bank in Chicago, the Halsted Exchange National Bank. Those drafts come in from all over the territory we operate, and we get a notification at approximately 12:30 each day telling us we have so much in drafts, and we draw a check to the order of the bank for the amount of the drafts that are in that day, and we send that over with our messenger and pick up those drafts. They do not clear against our bank account. They are drawn directly on the treasurer.

[fol. 51] Q. That operation is performed in New Britain?

A. Well, a part of it. The drawing of the draft, the making out of the draft, and the issuance of it is made there.

Q. And the transfer of the draft to the employee?

A. That is right.

Q. What about the incidentals? How do you pay for incidentals that may arise in connection with the carrying on of the terminal business at New Britain?

A. Well, supplies, of course no terminals are permitted to buy supplies. We have a centralized supplies department, and they get their supplies and fixtures and equipment through requisitioning the supplies department at the home office. They have no authority to buy supplies of any kind.

There are some. Utility bills are paid from the home office. Once in awhile they will go off of that like all branch offices will, forget instructions, and they will get the bill in. But I think our set-up has been for a number of years that the utilities bills are mailed in directly to the home office and we pay them by check directly to the Southern New England Telephone Company, and so on, that way.

Q. Yes, but also for incidental expenses or broken windows or anything you can think of, what about that?

A. That they hire a man here, a carpenter or somebody like that, and they would issue a draft, or pay him out of petty cash, if it is a small amount.

Q. That would apply to other incidentals, like carpentry or any kind of manual labor that has to be done, like plumbing?

A. Well, plumbing, we have the janitor who is sort of a handy man here at New Britain. There are items that they pay by these drafts or out of petty cash here. Most of the large proportion of the terminal operating costs, however, with the exception of terminal payroll, are paid from the home office. We have a theory of centralized control that we have had since '37.

Q. Where are the accounts receivable for Connecticut business collected?

A. Well, some of them might be collected in Chicago or [fol. 52] St. Louis, or even points beyond, and some of them might be collected here. If a shipment moves prepaid—

Q. Just a minute. "Here", you mean New Britain?

A. In New Britain, Connecticut. If a shipment moves prepaid out of Connecticut, where according to the billing, the shipper is to pay the freight charges, then the New Britain office, which handles the accounts receivable for all of the New England territory, those that materialize as a result of shipments moving in and out of Bridgeport, those that materialize or come into existence as a result of shipments moving in and out of New Britain and its territory, also Springfield, Massachusetts, Worcester, Providence, Rhode Island, Boston, Massachusetts, and Haverhill, Massachusetts—the New Britain administration office and picking-up department handles the accounts receivable of all of those offices. They all come in here.

Q. Well, let us confine ourselves to Connecticut accounts receivable for the moment. What percentage of Connecticut accounts receivable are handled by the New Britain office, and what percentage by the Chicago office?

A. Well, I started to explain. If a shipment moves out of Connecticut prepaid, that account receivable will be taken into the so-called New Britain accounts. We label it that for the purpose of identification; in other words, into the accounts receivable ledger which is kept here on that part of the business. If it moves "collect", however, in other

words, where according to the shipping order the consignee is to pay the freight charges at destination, then either the Chicago office or the St. Louis office will collect those freight charges and will therefore take the account into their accounts receivable ledger, depending upon where the destination is.

Q. Tell us how many truckloads move collect out of Connecticut compared to the truckloads that are prepaid.

A. Well, that is hard to say. You may get one month where the prepaid will be more than the collects, and another month where the collects will be more than the prepaid. There is so much moving prepaid out of Chicago into [fol. 53] Connecticut area that it over balances the other.

I would say this, I would say that by and large—

Q. Pardon me. May I interrupt just a minute? You are talking about truckloads moving out of Chicago into the Connecticut area, are you not? That is the statement you made.

A. Or Massachusetts area, which are also handled here.

Q. We were talking about truckloads moving out of the Connecticut area.

A. I would say it is about 50-50, when you average it up during the year. We have not taken occasion to really compute it, because it has not been a problem of any consequence to us, because the real problem is to set up a mechanism whereby the accounts receivable will be handled expeditiously, regardless of where they are to be collected within the credit regulations of the ICC. We must collect within seven days of the presentation of the freight bill.

Q. Are any orders or in a legal sense, contracts, made with Connecticut factories subject to acceptance by Mr. Spector, the general manager in New Britain?

A. What kind of contracts?

Q. Orders for shipment.

A. We do not have that. We are common carriers. We do not have a contract. Our contract is established by operation of law. When a shipper—

Q. I appreciate that. But in some instances, isn't it up to the judgment of the local traffic manager whether or not he has the room to receive the shipment or otherwise?

A. No, we cannot—

Q. Doesn't he exercise any individual judgment at all in the operation of the concern in shippings?

A. Well, of course he does exercise some discretion and some independent judgment.

Q. What is the nature of it?

A. Well, in the matter of what freight will he put on what truck, for instance.

Q. And what else?

A. Whose pick-up will he make first? Will he send trailer [fol. 54] no. 1520 to Fafnir Bearing, or will he send trailer no. 1506? Is that a 15—

Q. Suppose it came to a question of freighting very perishable goods.

A. I may say this, Mr. Gaffney. He has no administrative discretion whatsoever. He must, on all matters that are administrative in their nature—he operates according to standing home-office instructions or according to instructions issued either by Mr. Spector, myself, or one of our division heads—the administrations of an accounting officer who sits at a table, Mr. Arnold, or the general traffic manager, or the operations division head, or the sales manager.

Q. Now you operate—the Spector Company, when I say you—you operate about five trucks in Connecticut for the purpose of picking up loads at these various factories, do you not, and delivering them to the New Britain terminal?

A. For New Britain area I would say that is five.

Q. Those trucks—

A. Pardon me. We have freight brought in from our shippers and delivered to our consignees in the New Britain area by other means, too.

Q. Yes. I am just confining myself to these five trucks.

A. We have freight at New Britain, is also picked up and delivered through others, other than these five trucks, Brown and Porto and others. We have several others.

Q. These five trucks that I speak of, they are under the Spector registry, are they not?

A. Yes. I understand those are registered in the name of Spector Motor Service. I did not handle that. Mr. Bacon, my assistant handled that with Mr. Nair, so I am not familiar.

Q. Are those five trucks used in the state of Connecticut, practically exclusively in the state of Connecticut, in going around and picking up loads at the factories and bringing them to the terminals at New Britain and Bridgeport?

A. That is true. If you let me qualify that, that is true to the extent that it is a part of our through line-haul operation. That pick-up and that delivery that is made by that truck, is only for the purpose of starting or finishing a line-
[fol. 55] haul movement of that freight from a point outside of Connecticut into a point into Connecticut, or from a point into Connecticut to a point outside of Connecticut.

Q. Whatever the purpose they are used for, the fact remains, does it not, that those trucks operate in the state of Connecticut?

A. Those pick-up and delivery trucks that you mention never get out of the state of Connecticut. That is true.

Q. You rented those trucks from a man down in Meriden. Haven't you?

A. I think he is. Those that you refer to, I think a man named—I think so.

Q. Essener?

A. Espener. Mr. Arnold comes in contact with those deals more than I do.

Q. What is the arrangement on that hiring?

A. I do not know off-hand, except that we have an arrangement whereby he picks up and he handles our freight at so much per hundred weight, depending upon the size of the shipment. There are regular breakdowns. In other words, from up to 5,000 pounds there is a rate per hundred weight. For a certain amount from five to ten it is another amount. Up to fifteen it is another amount. If he uses a tractor for a pick-up and delivery, and our trailer, there is another amount. And off-hand I do not remember the rates. I have records of them in my office. We always have that, when I am interested in that particular information, as I happen to be making a survey of cartage cost right now in the New England territory, and I have to go to my black books and open them up and look at that particular information. I can't remember that.

Q. Spector Company has terminals, leased terminals, in four states: New York, Connecticut, Missouri and Illinois. Isn't that so?

A. Yes. We had a lease on a terminal in Boston until March, when we closed it and went into one—converted the Boston operation into a so-called agency terminal to meet that—

Q. Have you ever paid any state taxes in any one of those states?

A. State taxes.

[fol. 56] Q. State corporation taxes, corporation income taxes, franchise taxes, use taxes, any taxes in the corporate business.

A. We pay federal capital stock tax.

Q. Just a minute, please. No federal taxes, I am just talking about state taxes.

A. We pay in the state of Missouri and in Illinois, various state taxes.

Q. All right.

A. And we also pay certain taxes, liquor permits, and other things, liquor taxes in the states of New York and Maryland and New Jersey.

Q. Just a minute.

A. And various forms of taxes.

Q. Those liquor taxes are license taxes, are they not, for carrying liquor in those states?

A. I suppose you would call them a license tax, I suppose. We do pay other taxes.

Q. What taxes do you pay in Illinois?

A. Off-hand, I do not know. I would say we pay whatever taxes are legally required of us.

Q. Nominal taxes you pay in Illinois?

A. It depends on what you call nominal. We do pay taxes to the state of Illinois—in one form or another.

Q. It is a minimum tax rate you pay them there?

A. Not being a tax expert, I wouldn't know, Mr. Gaffney.

Q. What other states do you pay taxes to, state taxes?

A. State of Missouri.

Q. What is the nature of that tax?

A. Well, we pay, I believe, state income tax to Missouri. We pay personal property taxes.

Q. You pay to the—.

A. Through Wallace we pay quite a high personal property tax on this equipment, through the Wallace.

Q. Never mind Wallace. That is a separate entity, *it is* not, legal entity?

A. It is in one sense. In other sense it is not. It is a separate entity, separate legal corporate entity, that is true.

Q. And the tax is paid by Wallace and not by the [fol. 57] Spector? A. They do not come out of the Spector exchequer or coffers, as such, that is true.

Q. You are not claiming the Spector Transport Company is paying taxes when Wallace pays them?

A. I am merely mentioning, I am not claiming anything. That is for you as a lawyer. I merely mention it as a fact that Wallace does pay this high personal property tax in Illinois, and we regard it from our administrative and operational point of view that in effect it is Spector Motor paying it. Of course, whether that is proper legal presumption or not, I would not undertake to say at this time. We pay taxes to Missouri, however; we pay taxes to Illinois.

Q. Now you have got two states there. Missouri and Illinois.

A. We pay taxes to Indiana, I believe.

Q. What is the nature of that tax?

A. Off-hand I do not know. It is some kind of a tax.

Q. Personal property tax?

A. Something in connection—yes, personal property, I think or something in connection with compensation, I believe. I cannot remember. I think we do. We pay some state tax which is not a license tax in New York.

Q. I see.

A. We pay many license taxes.

Q. As a common carrier engaged, as you say, exclusively in interstate commerce, haven't you rather successfully avoided paying taxes in any of these states?

A. We have not avoided doing anything, Mr. Gaffney. We have paid whatever we felt was legal and proper, not prohibitive or exorbitant, and whatever was necessary to pay. Where the law has required that we pay it and there has been no question about our liability to pay, we have paid without question in all cases.

This happens to be one of the cases in which we do not feel we are either legally or morally obligated to pay under this particular tax act, and therefore, we have sought the benefit of a decision of a court.

[fol. 58] Q. I think that remains to be seen.

A. To determine whether we are right in the conclusion we reached.

Mr. Gaffney: That is all.

(At 11:45 A. M. a short recess was taken.)

By Mr. Gaffney:

Q. On the duty of the solicitor, so called, in the local terminal in New Britain, in the event that, for example,

Fafnir Bearing Company suddenly dropped you as a carrier, wouldn't he then contact Fafnir Bearing to see what the reason was, etc.?

A. Yes, he would.

Q. He would?

A. He would, and probably Fafnir Bearing—probably both Mr. David Spector and Mr. George Douglass and possibly Mr. Ben Spector would also come up here to find out why, being that important an account.

Q. That is all.

A. I would like to clarify that matter of that state tax. You asked me about the state tax. We do pay in all of the states in which we have terminals and payrolls, of course, the state unemployment tax.

Q. Yes.

A. The state unemployment throughout the system runs about $2500 a month. We pay about a thousand dollars per year in Connecticut.

Q. Not a corporation tax?

A. It is paid by the—we pay a franchise tax in Connecticut, too. We pay a franchise tax in the state of Illinois, franchise tax to the state of Missouri. Based on capital stock it is.

Q. The franchise tax you pay in Connecticut is for the privilege of a foreign corporation doing business in this state, is that right?

A. I am so informed. I think that is the basis. I wouldn't be sure.

Q. What was the amount of that tax?

A. The amount? In connection with that so-called qualification, I think that is $50 a year.

Q. $50 a year?

A. Of course the state unemployment in Connecticut based on payroll, is about a thousand dollars a year, about [fol. 59] a thousand dollars a year, but for the whole system it runs about $2500 a month.

Q. That is a universal tax throughout all the states, an unemployment compensation tax?

A. Throughout all the states in which you have employees.

Mr. Gaffney: That is all.

Redirect examination.

By Mr. Coleman:

Q. You purchase gasoline in Connecticut, also, don't you?

A. That is right. Gasoline is purchased in the same way. It is paid directly by Spector. That actually is paid by Wallace. Spector. Except the gasoline that is used, purchased for the salesmen in their cars.

Incidentally, Mr. Gaffney, our New Britain man also goes into Massachusetts. Mr. Hoelzer also covers some part of Massachusetts.

Recross-examination.

By Mr. Gaffney:

Q. This so-called franchise tax that you pay in Connecticut is a minimum basis rate, is it not?

A. That I wouldn't know. Mr. Arnold would know.

Q. It is the minimum tax for the privilege of doing business — the state of Connecticut for a foreign corporation?

A. I couldn't answer that. I know we pay the tax. What the basis is—

Q. Are you still paying that?

A. So far as I know.

Q. You are paying a minimum rate for the privilege of doing business in the state of Connecticut and you pay a tax on that every year?

A. We pay a tax each year in connection with a fee, tax assessed on the qualification, on the license to do business, which privilege we have never as yet exercised. We do not do business within the state of Connecticut.

Q. You claim you have never exercised it. It is a contradiction then in paying the tax, is it not?

A. That I wouldn't say. That is a legal question that I would not undertake to give an opinion on.

Mr. Gaffney: That is all.

[fol. 60] By Mr. Coleman:

Q. That qualification to do business in Connecticut, as you testified yesterday, was started in connection with that lease in New Britain?

A. In New Britain.

Q. The landlord insisted?

A. That was the only reason it was gone into, and the only reason it was maintained, yes.

Q. You said that subjects you to the jurisdiction of Connecticut courts for suits?

A. For the purpose of service, etc.

By Mr. Gaffney:

Q. Pardon me. I overlooked this question. You said yesterday you had three trucks you were buying on conditional bill of sale?

A. Yes, so I am informed.

Q. Where is that bill of sale recorded?

A. I would think that it is recorded here in Connecticut.

Q. What town in Connecticut?

A. Probably New Britain. I do not know the details. As I said before, Mr. Bacon and Mr. Nair handled the details of that particular transaction and I am not familiar, exactly, with them.

Those are the trucks, of course, that are used in pick-up and delivery service that we talked about before.

Is that all?

Mr. Coleman: That is all, Mr. Fisher.

(Witness excused.)

Oliver Arnold, called as a witness on behalf of the plaintiff, being first duly sworn by Clerk Pickett, testified as follows:

By Clerk Pickett:

Q. Your full name?

A. ~~Oliver~~ Arnold.

Q. Where do you live?

A. 7456 South Shore Drive, Chicago, Illinois.

Direct examination.

By Mr. Coleman:

Q. What is your business or occupation, Mr. Arnold?

A. I am employed by Spector Motor Service in an administrative and accounting capacity.

[fol. 61] Q. What experience in the accounting line have you had? First of all, how long have you been employed by the Spector Motor Service?

A. I have been employed by Spector almost four years.

Q. Prior to that time were you engaged in practice as an accountant?

A. Yes, I was employed by the firm of J. W. Boyle and Company of East St. Louis in the capacity of a senior accountant doing public accounting work.

Q. What business is J. W. Boyle in?

A. They are certified public accountants.

Q. Prior to your connection with the Boyle Company, what were you doing?

A. Well, I had worked various times for the American Red Cross as a disaster and field accountant on different emergency jobs.

Q. Prior to that, were you in Washington?

A. I worked for the Federal Surplus Relief Corporation, in Washington, D. C., as an accountant.

Q. At my request have you prepared an exhibit, Mr. Arnold?

A. Yes.

Q. Showing the effect of a tax similar to that employed in Connecticut extended over all the states through which the Spector system operates?

A. Yes.

Mr. Gaffney: I object to this exhibit, your Honor. The same situation does not prevail in all the states where the Spector corporation operates. It is obvious from the answers that were submitted by the previous witness, that in Connecticut, Missouri, Illinois and New York are the four places where they have leased terminals and where they employ local help and carry on to a certain degree a local business. In other states they are merely in transit, going through, as far as we are able to determine.

I do not think this exhibit in any sense has a bearing on this case other than to give a distorted picture of what the burden on interstate commerce would be in the event that in each state through which a truck operated by Spector [fol. 62] passed, they would carry such a burden under such a picture that it would clearly show there was a burden on interstate commerce, which is not a clear picture as we claim it here.

We are claiming solely, that there is a Connecticut operation here, and consequently an exhibit such as this would not be a fair exhibit since it covers lots of states where the

same situation as prevails in Connecticut does not prevail.

Mr. Coleman: My claim, your Honor, is that the reason I asked this exhibit be prepared, is that the present Chief Justice in the Gwin case, recently decided, which will be cited to your Honor, says that one of the considerations which the Court should give to a tax made by a state is the incidence of such a tax operating over all the system. And I think that such an exhibit should be admitted. The weight, of course, to be given to it is a matter in your Honor's discretion, but it does seem to me that it is one of the factors at least, that you ought to consider in determining whether this tax is constitutional or not.

Mr. Gaffney: It has appeared from a previous witness that there has not been a tax paid in any state of the nature of the tax levied by Connecticut. They have not paid the Connecticut tax. It would not present the true picture under this state.

Mr. Coleman: The other states were better.

The Court: The objection is overruled.

(*Plaintiff's Exhibit 15:* Statement entitled "Comparison", 1940, 1939 and seven months 1938.)

Mr. Coleman: May I have one of those?

(Witness handed paper to Mr. Coleman.)

By Mr. Coleman:

Q. Now would you explain what this exhibit reffects?

A. This exhibit that I compiled is a comparison of our gross income, or as it has been termed a number of times, gross sales or gross revenue or total charges for freight handled, our net income as computed for our federal income [fol. 63] tax return, and then an item that is marked "tax" which is computed on the basis which the State of Connecticut uses.

This is for the year 1940, 1939 and for seven months of 1938. That seven months period occurs because we changed from a fiscal to a calendar year at that time in order to comply to some ICC regulations regarding reports and system of accounts that they installed in 1938.

Q. First of all, is this tax computed on the allocation method set up in the Connecticut statute?

A. Yes.

Q. And the net income is based on your federal income tax report?

A. Yes.

Q. Are they here in the courtroom so that they are available for inspection by Mr. Gaffney, if he desires to see them?

A. Yes.

Q. Have you also at my request brought here your annual reports to the Interstate Commission as to your gross and net revenues?

A. Yes.

Q. Are those reports here, available here in the courtroom, available to Mr. Gaffney if he desires them?

A. Yes.

Q. What is the relationship of the tax, Mr. Arnold, to gross revenue, and what is its relation to net revenue as shown by this exhibit?

A. Well, as shown by this exhibit, the tax as computed by the State of Connecticut, follows the gross revenue and has no connection with net income of the Company. Very clearly brought out—in 1938 the seven months, with a gross revenue of 432 thousand dollars, our net income to the Company was 111 dollars, but using Connecticut's computation of tax there would have been a five thousand dollar tax. In 1939, with a revenue of 1,200,000, the net income which we reported for federal income tax returns was $46,000 and the tax as computed by Connecticut would be $15,442.91. We find there, as compared to 1938 and '39, you had three times the amount of business. Our net income for federal purposes was $46,000 against $100. But [fol. 64] our Connecticut tax, using Connecticut formula, trebled the same as the gross revenue did.

In 1940 you will find the same increase in the gross revenue and tax as computed by the State of Connecticut, but our net income dropped that year to $10,000. If the tax as computed by Connecticut were collected all over, it would have shown an operating deficit or loss for that year of $10,000.

Q. I note, Mr. Arnold, that as between 1939 and 1940 there was a drop in your net income as reported to the federal government.

A. That is right.

Q. And yet, the tax, if it had been levied by all the states, would have increased rather than decreased?

A. It would have increased $5,000.

Q. What can you say about the ratio of the increase of the tax as compared to the ratio of the increase of the gross revenue?

A. Well, the tax computed by Connecticut seems to bear the same ratio of increase as the gross revenue of the Company. It follows it right all the way through.

Q. Did you prepare, at my request, a profit and loss statement of Wallace Transport Company?

A. Yes.

Q. What item is that under your marking?

A. 8.

Q. Is that it?

A. That is it.

Mr. Gaffney: Objection is made, your Honor.

The Court: He has not offered it.

Mr. Coleman: I offer, at this time, your Honor, a balance sheet, statement of income and profit-loss of the Wallace Transport Company from October 1, 1939, to September 30, 1940. And the purpose of this is to rebut the State's method of computing the tax. The State, in computing the tax, has allowed us not the entire amount that we pay to the Wallace Transport Company for the use of their trucks. Do you see? But only sixty per cent. The State apparently concedes that sixty per cent is a proper operating charge which should be deducted from our gross [fol. 65] revenue. We are putting in the profit and loss statement of Wallace Transport Company to show that that sixty per cent deduction is not a fair one.

Mr. Gaffney: Objection is made to the admission of this one, your Honor. Profit and loss of the Wallace is not a concern in this particular trial here. It was admitted, I believe, that the sixty per cent was the fractional allocation that we allowed to the Wallace Transport, and why we should burden this particular trial with a profit and loss statement of the Wallace Transport Company, I think is immaterial.

Mr. Coleman: It seems material to me that the problem is raised in this case because the State does say "We won't grant you all these sums of money. We won't concede it is rent." The State says, "We will only allow you sixty per cent. Sixty per cent is really only the operating costs."

We claim that this exhibit here will show that only 100% of the amount paid over to Wallace is really an operating cost of Spector and therefore should be a deduction.

The Court: It may be admitted.

(*Plaintiff's Exhibit 16:* Statement entitled "Wallace Transport Co. Statement of Income and Profit and Loss for the Period October 1, 1939, to September 30, 1940.")

By Mr. Coleman:

What does that exhibit in your hand reflect?

A. This exhibit is one that I made up from reports of the Wallace Transport Company, and which covers the revenue and operating expenses for the fiscal year.

Q. Are you engaged in accounting in connection with the Wallace Transport as well as the Spector?

A. I have complete supervision and charge of all accounting for the Wallace Transport Company.

Q. For that period what was the income of the Wallace Transport Company?

A. The Wallace Transport income was $529,474.70.

Q. Where was all that money received from, from what [fol. 66] source?

A. That money was all received from the Spector Motor Service.

Q. In exchange for what?

A. In exchange for the use of the trucks.

Q. Use of the trucks of the Wallace Transport Company?

A. That is right.

Q. During that period what were the total disbursements, expenses of the Wallace Transport Company?

A. Total expenses were $533,019.52.

Q. Leaving a deficit of how much?

A. Of $3,544.82.

Q. Those expenses and those items that you have given there, it is true they are contained in the exhibit, but would you for the record read what they are?

A. Motor fuel, $141,962.72, motor oil $6,920.62, repairs $109,015.49, tires and tubes $61,632.23, painting and lettering $1,027.25.

Mr. Gaffney: Pardon me. Before he goes on, might I note a further objection, your Honor, to this? This is on a fiscal year basis, and the Spector operates on a cal-

endar year basis. And it does not reflect a true condition between the two companies on that basis. Operating costs are larger during certain months. Taxes are paid during certain months. And consequently, this would reflect an entirely distorted picture.

The Court: Objection overruled.

By Mr. Coleman:

Q. Would you continue with the reading?

A. Inspection and servicing $9,729.32, depreciation, $89,671.42, insurance $26,033.12, road expenses, tolls, etc., $10,987.45, telephone and telegraph $2,727.84, stationery and office supplies $1,969.34, license and taxes $13,144.40, legal and accounting fees $2,824.15, rent, light, heat, etc., $3,014.78, salaries $36,321.53, expenses of general office employees $143.69, interest expense $15,894.17, making total expense of $533,019.52.

Q. That sheet is for the period of——

A. For the period from October 1, 1939, to September 30, 1940.

[fol. 67] Q. From your knowledge of the affairs of the Company, is there any substantial difference of what is chosen, either a calendar or a fiscal year, so long as twelve months is included?

A. It makes no difference, so long as twelve consecutive calendar months are included.

Q. Assuming that Spector Motor Service Company owned the trucks instead of Wallace Transport, Mr. Arnold, are there any items on that exhibit before you which could be eliminated as an operating expense?

A. No, there is not.

Q. In other words, if Spector owned these trucks, they would have to pay the same amount for upkeep, etc.?

A. They would appear on the books of Spector Motor Service as expenses.

Mr. Coleman: You may inquire.

Cross-examination.

By Mr. Gaffney:

Q. It is true, is it not, that the Spector Motor Service Company carries their accounts on a calendar year basis?

A. It was changed to calendar year basis in 1938.

Q. All right, then, it does not correspond in any respect to this computation of the Wallace Transport Company which is carried on a fiscal year basis, does it?

A. I would say it is comparable because it is for twelve consecutive months which cover all four seasons of the year.

Q. Well, your exhibit, Wallace Transport Company, runs from October 1, '39 to September 30, 1940, does it not?

A. That is right.

Q. In certain seasons of the year are there not increased taxes to be paid?

A. When you consider a twelve month period you have your taxes spread over the entire year, and it would make no difference whether the taxes were paid in January or July as long as it was within the twelve month period.

Q. When are most of the taxes paid, what month?

A. You will find your heavy taxes are in January and February.

Q. January and February?

A. Yes.

[fol. 68] Q. What year are you comparing this particular exhibit, due to the Spector Transport?

A. This shows the typical operation of a fleet of equipment. I do not say we are comparing it with any particular year of the Spector operation.

Q. You are the accountant who handles the tax payments of the Spector Company, are you not?

A. Yes.

Q. How long have you been working for Spector?

A. Not quite four years.

Q. What is the gross revenue of Spector during the last four years?

A. I do not have the figures available in my mind. I read off revenue for 1940 and 1939 which is on that exhibit which I had first. In prior years, the revenue was lower.

Q. Well, what does it approximate? Can you tell us that?

A. In 1940, the gross, that is, before any expense at all, was 1,700,000 in round figures.

Q. And '39?

A. In 1939 it was 1,200,000.

Q. And '38?

A. In '38 we were not on the calendar year, and that year is broken up. For seven months ending '38, the gross there was a little over 400,000.

Q. During those three periods what was the ratio of gross income originating in Connecticut?

A. I would have to check some of my work papers to give you those figures.

Q. Haven't you got them ready?

A. I have not, in my mind. I cannot remember all those figures.

Q. Have you got them written down on your work sheets?

A. Yes. I have them on my work sheets.

Q. Would you get them, please?

(Witness produced the papers.)

A. In 1940 it was thirty-four per cent and a fraction.

Q. In other words, would you explain that thirty-four per cent? Does it mean thirty-four per cent of the entire gross revenue of the Spector Motor Transport Company originated in Connecticut in the calendar year 1940?

A. I would say that the shipments originated in Connecticut.

Q. Thirty-four per cent of all?

A. Thirty-four per cent.

[fol. 69] Q. That considered thirty-four per cent of the gross revenue received by the Spector Company?

A. That is right.

Q. Now '39.

A. In 1939 it was forty-two per cent.

Q. And the same situation prevailed as I have just explained, that forty-two per cent of all the gross revenue of the Spector Transport Company originated in Connecticut in 1939?

A. That is right.

Q. Now for the seven months of 1938.

A. That figure I do not have available right at the moment.

Q. Do you know whether it ran over fifty per cent, or not?

A. No, it did not.

Q. Did you help Mr. DeCicco when he examined the books?

A. When Mr. DeCicco examined the books, I made the books available to him, and I gave him space where he could work. I did not work with him at any time when he was taking figures off the book.

Q. So that, for example in 1939, despite the fact that only 4.33 per cent of all the mileage travelled by the Spector Transport Company trucks was in Connecticut, neverthe-

less, there originated in Connecticut forty-two per cent of the entire gross revenue of the Company?

A. That is right.

Q. Did you see the computations as made by Mr. DeCicco concerning the amount of business originating in Connecticut?

A. Yes.

Q. Do you recall whether or not it was over fifty per cent for the seven months of 1938?

A. It was around fifty per cent. I do not know right now whether it was over or under.

Q. It was around fifty per cent, you say?

A. It was around fifty per cent, I recollect.

Q. The reason that in your exhibit you made the computation that there was in 1938 only a net profit of $111.39, after the compatation and deduction of the taxes, that arose principally because there was a tax on rental; isn't that so?

A. I do not understand that question.

Q. Let me go back. You did not mean to inform the [fol. 70] Court that the Connecticut tax was a tax on gross revenue, did you?

A. The only feeling I can get from that comparison is that it is a tax on gross revenue.

Q. Actually the statute says it is a tax on net income. Isn't it?

A. Well, Connecticut's use of the word——

Q. Doesn't it say that? Wait a minute now——

A. —net income is a little bit confusing, inasmuch as an accountant, and under federal returns, purchased transportation; that is, put on the books of the Spector Motor Service in accordance with I.C.C. accounting regulations, is a deductible expense. Connecticut tax department there and the auditors have taken the stand that this item of purchased transportation which is broken into two parts, salary and equipment, is rent, and as a result have started using sixty per cent of salary and equipment as allowable deduction and forty per cent as not.

Q. Just a minute. The Connecticut tax is exactly the same as the Internal Revenue tax with two exceptions, is it not? Rent and interest are not allowed as deductions; isn't that right?

A. Yes.

Q. So that the Connecticut corporation tax is identical as a net income tax or the income tax of the Federal Government with those two exceptions?

A. That is right.

Q. Then it is a tax on net income with the exception that no deduction is allowed for rent or interest?

A. That is right.

Q. You didn't mean to imply to the Court that it was a tax on gross income, did you?

A. The method that was used by the State of Connecticut in computing the taxes for the Spector Motor Service, made it a tax on gross income, because the item of purchased transportation is over sixty per cent or around sixty per cent of the expense of Spector Motor, and when that is disallowed it automatically makes it a gross income tax.

Q. That goes into the qualification of rent paid, does it not?

A. The State of Connecticut has called that as rent.

Q. In other words, whereas, in the Federal tax, rent is deductible, it is not deductible in the State tax under this [fol. 71] corporation tax we are now concerned with, and this sixty per cent, rather than charge 100 per cent, they fractionalized the tax and allowed the deduction of sixty per cent and charged you forty per cent on the rental equipment; is that correct?

A. They charged us forty per cent on salaries paid to the drivers, which I cannot see as rent at any time.

Q. They considered that as rent?

A. The State of Connecticut has considered salaries paid to over-the-road drivers as rent.

Q. Who pays the money to the Wallace Transportation Company?

A. Spector Motor Service.

Q. Do they pay enough money to include the salaries of the drivers?

A. The Spector Motor Service pays the drivers direct.

Q. The driver drives the rented truck, does he not?

A. Yes.

Q. And it is part and parcel of the rental of the truck, that the driver handles that truck, isn't it?

A. No. We lease the truck from Wallace Transport, but Spector Motor Service puts the driver on the truck and pays his salary.

Q. How long has that been going on, that they have been paying their own drivers of the trucks?

A. They have been paying them as long as I have been with the Company.

Q. As a matter of fact, the Spector Company used to have an owner-driver system, didn't they?

A. Yes. They still have.

Q. They still have. How many trucks are operated on the owner-driver system?

A. Off-hand I do not know now, but those drivers are also paid by Spector Motor.

Q. But even if they own the truck?

A. But they are paid for the driving with a payroll check as a driver.

Q. You are not able to tell now how many trucks are operated under that owner-driver system?

A. There have been changes, some men gone into the Army. Some have sold their trucks. Some have quit.

Q. It is true, too, is it not, that you are trying to eliminate [fol. 72] that system? Spector Motor Company is?

A. Not to my knowledge. And I feel I would know it if they were.

Q. Under the owner-driver system, each driver has his own particular truck with his name on it?

A. They have the name of Spector Motor Service on it.

Q. Along with the Spector Motor. That is the big name. They have their own name on the truck some place, haven't they?

A. No.

Q. They have a certain truck assigned to them?

A. An owner-operator drives his truck which he owns, which is his tool for earning a living. He needs that truck to draw a weekly salary the same as a mechanic does in a garage. He has to have tools to earn his living as a mechanic. This truck is a tool for that driver. That insures him of work whereby he will get a pay check every week.

Q. You are not able to tell us, as accountant for Spector and Wallace, how many are owner-driver trucks now?

A. There have been changes made, but at the present time I estimate that there was between forty and fifty owner-drivers.

Mr. Gaffney: That is all.

Redirect examination.

By Mr. Coleman:

Q. Mr. Arnold, can you tell us whether the system by which Spector Motor Service pays the drivers direct by a separate check, under what authority or requirement is such a practice adopted by the Company?

A. There is a number of requirements. Under the ICC administrative ruling 4 it clearly states that those men are employees of Spector Motor. Under the social security legislation or old age benefit deductions, and under State unemployment acts, they are considered our employees, and in order to make the deductions it is necessary to issue the check. We also have a Union contract which clearly states those men are our employees and they must be paid with a payroll check.

Q. Supposing a man owns a truck and operates it for Spec- [fol. 73] tor. Under the ICC No. 4, still must he be paid individually for his services by separate check, as a driver?

A. He is considered an employee of Spector Motor, and as such he has to be paid a payroll check.

Q. As a driver?

A. As a driver.

Q. What happens to the balance of the amount?

A. The balance of the amount, there is a separate check given him for that amount.

Mr. Coleman: All right.

Recross-examination.

By Mr. Gaffney:

Q. I overlooked two things. First of all, the percentage of Connecticut-originated business in the year 1936. Can you give us that?

A. Off-hand I do not know, and I did not have charge of the books of the Company at that time.

Q. Well, 1937.

A. '37 was before my time with the Company.

Q. You do not know either one of those years?

A. No. I started in the latter part of 1938.

Q. You are familiar with the taxes that Spector Company pays, are you not?

A. Yes.

Q. What corporation taxes are paid by the Spector Company?

A. We pay corporation taxes in the state of Missouri and Illinois.

Q. What is the nature of those taxes?

A. Not being an expert, I would say that they were franchise taxes, based on the capital stock and surplus of the Companies.

Q. Then you are paying a tax in the state of Missouri and Illinois, a corporation tax?

A. Yes.

Q. And you have a terminal in Illinois, have you not?

A. Yes.

Q. And home office in Missouri?

A. Yes.

Q. Do you pay any tax in the State of Connecticut, corporation franchise tax?

A. The tax of fifty dollars a year.

Q. That is the minimum base rate, is it not?

[fol. 74] A. I do not know what the base rate is. That is usually submitted to an attorney and he says that is in order, and I pay it, give it approval.

Q. That is a tax on a foreign corporation for the privilege of doing business in the state of Connecticut, is it not?

A. That is what I have been told it is.

Q. You deny that any business is done in the state of Connecticut, do you not?

A. Yes.

Q. So it is a contradiction of fact there?

Mr. Coleman: That is certainly an argumentative question.

Mr. Gaffney: I guess it is obvious, though.

By Mr. Gaffney:

Q. Do you pay any in New York, any taxes, corporation taxes?

A. We pay an occupancy tax in New York City.

Q. An occupancy tax. What kind of a tax is that?

A. It is a tax there. I don't know whether it is City of New York or State of New York.

Q. How big is that terminal in New York?

A. I do not know the dimensions of the New York terminal. I know it consists of two buildings and a large yard.

Q. Going back now to your Illinois tax, how much does that amount to a year?

A. The Illinois franchise amounts to around seventy-five dollars a year.

Q. That is comparable to the fifty dollar tax you are paying in Connecticut, is it not? It is nominal?

A. Well, fifty to seventy-five dollars. You can compare two sums of money.

Q. You might say it was a nominal tax, might you not?

A. I do not know the interpretation of the word "nominal".

Q. How much tax do you pay in Missouri, corporation tax?

A. Missouri is around seventy-five dollars.

Q. So you have a company with a gross revenue of almost two million dollars in the last year of operation?

A. That is right.

Q. And you are an interstate carrier engaged in interstate commerce?

A. That is right.

[fol. 75] Q. And you have terminals in the state of Connecticut, New York, Illinois and Missouri?

A. That is right.

Q. And your principal place of business is in Illinois, and your home office is in Missouri?

A. That is right.

Q. And you pay to the state in taxes the sum of seventy-five dollars in Missouri, seventy-five dollars in Illinois, and fifty dollars in Connecticut. That is right?

A. Yes.

Mr. Gaffney: That is all.

By Mr. Coleman:

Q. You haven't told us about the other taxes.

A. We also pay unemployment taxes in every state where we have employees, that is, Massachusetts, Connecticut, New York, Illinois and Missouri.

Q. Rhode Island?

A. Rhode Island, we have just put an employee up there, and taxes will be paid in 1942 for an employee in Rhode Island.

Mr. Gaffney: That is all.

By Mr. Coleman:

Q. Can you tell us the gross amount of those unemployment taxes which you pay throughout the system?

A. The amount, around 2,000 to 2,500 dollars per month.

Mr. Coleman: All right, that is all. That is all.

(Witness excused.)

Mr. Fisher, just for two questions.

SIMON FISHER, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Mr. Coleman: The last exhibit that was put in was the balance sheet of Wallace. Would you give me an extra copy of that?

(Mr. Arnold handed paper to Mr. Coleman.)

Direct examination.

By Mr. Coleman:

Q. Profit and loss statements of trucking companies are a matter of public record with the I. C. C., are they not, in Washington?

A. That is right.

[fol. 76] Q. As a result, the figures are available to the industry in general?

A. That is right.

Q. Are you familiar in general, from your experience and contact with the industry, as to the figures and proportions of profit and loss statements running through the industry in general?

A. Yes, I am.

Q. The profit and loss statement of the Wallace Transport Company which has been put in evidence, is that fairly representative of conditions throughout the industry?

A. The operational costs.

Q. The operational costs?

A. Yes, I would say so.

Q. Wallace Transportation Company trucks are all one hundred per cent used by Spector, are they not?

A. That is right.

Q. I note that, in the sheet before me, the Wallace for this period ran at an operating loss.

A. Yes, sir.

Q. If that is so, Mr. Fisher, how does the individual owner-operator, how does he actually make a living if, as these sheets reflect here, there is an operational loss?

A. Well, as to the individual owner-operator, the revenue from which the expenses would be deducted is net in the salary paid to drivers on there. Now actually the individual hired operator does not now, now less than ever, and never did make any so-called profit on the use of his equipment.

In the early days of the trucking business, the thing that enabled the trucking business to grow was the fact that there were large numbers of men who owned tractors and trailers, and there were numbers who were willing to buy tractors and trailers and put them to work with a common carrier on various types of rates and arrangements which were made. Those schedules fluctuated, and the types, the bases have fluctuated and changed from time to time.

They were willing to put them to work so that they would get a job, this job being the job of driving these trucks from one point to another. And ordinarily they [fol. 77] were paid. In the beginning they were not paid a salary. Back in 1932 or '33, there was no separation as to salary. But as the Federal regulation came in, and as insurance requirements came in, compensation insurance particularly, and as the business became Unionized, a definite part of that was salary. But when the man got through paying himself plus his helper for the compensation for driving that truck from the point of origin to the point of destination, what he had left is actually the same thing as you see on that balance sheet. He had just about enough left to pay the expenses of the trip, that is, the road expenses and other things.

By the Court:

Q. Do these salaries in Exhibit 16 include any drivers salaries paid by Wallace?

A. May I see? (Pause.) These would be shop salaries, maintenance, administrative employees and some local cartage drivers salaries. Not to a great extent. Tha is, some of this revenue here was derived from the operation of about five trucks in and around Chicago, and it would include some of that. But whatever the amount, it would be balanced off either way. It does not include the over-the-road salaries at all, neither the revenue nor the expense.

Q. It does not include the salaries of officers of the Corporation?

A. No, sir, it does not. We have never drawn salaries in the Wallace Company as compensation as officers.

By Mr. Coleman:

Q. So the owner-operator made his living by his salary as a driver?

A. Primarily that is what it was. In other words, the only thing that that truck meant to him was it provided the means by which he was able to go to work for, say Spector Motor, because without the truck Spector Motor would not and could not have put him to work, because Spector Motor did not have a truck that he could drive. And that is the way the trucking business grew. But the amount that he had left was just an amount equal for his [fol. 78] driving. Now, under administrative ruling 4, the owner, when he drives, is an employee of the carrier, and his helper, too, what we call a helper.

Q. You have used a trade term in the course of your testimony, Mr. Fisher, local carters or local cartage?

A. Local cartage.

Q. Is that local cartage divorced or separated or distinct or different from your interstate commerce business?

A. No, it is a part of our through line-haul operation. We call it by that term merely to designate the fact that it is the part of the line-haul operation from the shipper's platform to our consolidation and distribution platform, or the converse. It is still a part. Our rates are based on store-door delivery, and that is a part of the line-haul service that we charge for——

Q. That is all.
A. —that our rates are based on in the tariff.

Mr. Coleman: That is all.

(Witness excused.)

The plaintiff rests, your Honor.

ALFRED DECICCO, called as a witness on behalf of the defendant, being first duly sworn by Clerk Pickett, testified as follows:

By Clerk Pickett:

Q. Your full name?
A. Alfred DeCicco.
Q. Where do you reside?
A. 19 Farnham Road, West Hartford.

Direct examination.

By Mr. Gaffney:

Q. You are employed by the State tax department, Mr. DeCicco?
A. Yes, sir.
Q. You have been for over a period of years?
A. One month and a few days shy of seven years.
Q. What is the nature of your duties there?
A. I am a senior tax examiner, and I go out in the field and conduct audits of miscellaneous corporations, savings banks and trucking companies.
[fol. 79] Q. Did you inspect the books of the Spector Motor Transport Company?
A. Yes, I did.
Q. What was your purpose in going out there?
A. To determine the tax liability of the corporation.
Q. In examining the books did you allocate a certain percentage of the business from the books to Connecticut?
A. Yes, I did.
Q. That is business originating in Connecticut?
A. Originating in Bridgeport and New Britain.
Q. Did you make an estimate of the percentage of the amount of business that did originate in Connecticut for certain years?

A. Yes, I did.

Q. Starting with what year?

A. Fiscal year ended May 31, 1936.

Q. This is from an examination of the books of the Spector Company?

A. That is right.

Q. These percentages you have got here, are they not?

A. Yes, sir.

Q. What was the gross revenue of the Spector Company for the year 1936?

A. $233,787.78.

Q. Of that gross revenue for that year, how much is attributable to Connecticut business?

A. $111,709.97.

Q. What percentage is that?

A. 0.477826.

Q. A little better than 47 per cent?

A. A little better than 47 per cent.

Q. What was the gross income or revenue for the year 1937?

A. $440,025.92.

Q. And how much of that was attributable to Connecticut?

A. $166,610.06.

Q. Percentage-wise, what was the percentage of that business attributable to Connecticut?

A. 37.8637.

Q. For the year 1938 was it a split year?

A. The year 1938, yes. There is a period ended May 31, 1938, that is June 1 to May 31, and then seven months ended December 31, 1938.

[fol. 80] Q. For the first five months what was the gross revenue?

A. $318,786.85.

Q. How much of that revenue was attributable to Connecticut business?

A. $150,296.95.

Q. What percentage is that?

A. 47.1465.

Q. For the last seven months of 1938, how much was the gross revenue?

A. $432,087.39.

Q. Of that how much was Connecticut business?

A. $218,471.73.

Q. And the percentage was what?

A. 50.5619.

Q. The percentage of Connecticut business for those seven months ran over 50 per cent of the entire gross business done by the Spector Motor Corporation?

A. That is right.

Q. For the year 1939 what was the gross revenue?

A. $1,202,210.35.

Q. Of that gross revenue, how much was attributable to Connecticut?

A. $505,777.47.

Q. And the percentage was——

A. 42.0706.

Q. And for the year 1940?

A. $1,723,510.65, gross everywhere, and $587,973.59 Connecticut, or a percentage of 34.1149.

Q. And that business attributable to Connecticut was business originating in Connecticut?

A. New Britain and later in Bridgeport.

Mr. Coleman: Would your Honor take a recess at this point?

The Court: Yes, we will take a recess till two o'clock.

(At 12:58 P. M. a recess until 2 P. M.)

Wednesday, June 17, 1942, Afternoon Session.

ALFRED DECICCO, a witness called on behalf of the defendant, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Coleman:

Q. Mr. DeCicco, when we suspended, you had just finished testifying about the allocation which you made, and [fol. 81] you testified as to the percentage of gross business which originated in Connecticut.

A. That is right.

Q. In the first place, didn't you ascertain as a result of your examination that substantially fifty per cent of the

amount collected by the Spector Motor Service for this freight which originated in Connecticut was collected outside of Connecticut?

A. Collected, yes.

Q. Outside of Connecticut?

A. Yes.

Q. That is substantially true, is it not?

A. Yes.

Q. Showing you Exhibit 8 of the relative mileage in various states over which Spector operates, it is true, is it not, that even if this business which originates in Connecticut the bulk of the work is done outside the state of Connecticut by Spector Motor Service?

A. Well, according to this exhibit as far as the travelling, but I did not enter into the mileage feature of it.

Q. You did not investigate that phase of it at all?

A. No.

Q. I show you a computation of the allocation fraction and ask you if that is not a true copy of the allocation which you made?

A. I believe it is.

Mr. Coleman: May that go in as a full exhibit?

(*Plaintiff's Exhibit 17:* Statement entitled "Computation of Allocation Fraction.")

By Mr. Coleman:

Q. And I show you a computation of the tax based on the allocation fraction which was computed in the preceding exhibit. Is that a true copy of the computation of the tax in tabular form?

A. I believe it is.

(*Plaintiff's Exhibit 18:* Statement entitled "Computation of Tax.")

By Mr. Coleman:

Q. I show you a copy of our Supplement to the General Statutes and ask you in what section you found the directions for determining the allocation fraction. I think I have opened it for your convenience to the proper place.

A. That is section 356e, chapter 66b as amended.

[fol. 82] Q. That is from what Supplement?

A. The 1939 Supplement.

Q. The 1939 Supplement to the General Statutes of Connecticut?

By the Court:

Q. What is that section again?

A. 356e.

By Mr. Coleman:

Q. Where specifically in that 356e is a method for setting up an allocation fraction outlined?

A. The entire section deals with the allocation, distinguishing between two different types of income, that income from so-called surplus earnings and income from the ordinary operations of the corporation.

The allocation deals with this case. Do you want me to read it?

Q. Yes, please. Would you read the allocation which the department contends deals with this specific case at bar?

A. "(b) when derived from the manufacture, sale or use of tangible personal or real property, the portion thereof attributable to business within the state shall be determined by means of an allocation fraction to be computed as the simple arithmetical mean of three fractions. The first of these fractions shall represent that part of the average monthly fair cash value of the total tangible property held and owned by the taxpayer during the income year which is held within the state, without deduction on account of any incumbrance thereon but excluding any property the income of which is separately allocated under the provisions of this section. The second fraction shall represent the part of the total wages, salaries and other compensation to employees paid by the taxpayer during the income year from offices, agencies or places of business within the state, provided all such payments shall be assigned to the office, agency or place of business of the taxpayer at which the employee chiefly works or from which he is sent out or with which he is chiefly connected. The third fraction shall [fol. 83] represent the part of the taxpayer's gross receipts from sales or other sources during the income year, excluding any income which is specifically allocated under subdivision (1) and (2), which is assignable to offices,

agencies or places of business within the state, provided such receipts shall be assigned to that office, agency or place of business at or from which the transactions giving rise thereto are chiefly negotiated and executed."

Q. That is the formula that was used by you in the department? Is that so?

A. That is right.

Q. That formula, Mr. DeCicco, by its terms applies only to businesses which are engaged in the manufacture, sale or use of tangible personal or real property; is that not so?

A. That is so, yes.

Q. A different direction is contained in the statute for income which is derived from business other than the manufacture, sale or use of tangible——

A. That is right.

Q. In the case of businesses which are engaged other than in the manufacture, sale or use of tangible personal or real property, the allocation according to the statute is to be determined by the tax commissioner; is that so?

A. That is right.

Q. Is it your understanding that the Spector Motor Service is engaged in either the manufacture, sale or use of tangible personal or real property?

A. Yes, sir.

Mr. Gaffney: Well—the answer to the question is in.

Mr. Coleman: Do you want it stricken?

Mr. Gaffney: I was going to put Mr. Steege on if you want to ask that question.

Mr. Coleman: All right. I think that is all, Mr. DeCicco, thank you.

(Witness excused.)

Otto P. Steege, called as a witness on behalf of the defendant, being first duly sworn by Clerk Pickett, testified as follows:

By Clerk Pickett:

Q. Your full name?

A. Otto P. Steege.

[fol. 84] Q. Where do you live?

A. 190 Brimfield Road, Wethersfield.

Direct examination.

By Mr. Gaffney:

Q. You work for the State, Mr. Steege?
A. State Tax Department.
Q. What is your position?
A. Corporation director.
Q. Director of the corporation division of the State tax department?
A. That is right.
Q. You have been director for how many years?
A. Five years.
Q. You have charge of all the levying and collection of corporate taxes, have you not?
A. That is correct.
Q. You have assessed a 60 per cent tax on rent against Spector Motor Service Corporation, have you not?
A. We have disallowed 40 per cent.
Q. Disallowed 40 per cent?
A. Taxed 40 per cent, in other words.
Q. Taxed how much?
A. We taxed 40 per cent of the total paid.
Q. What is the basis for that computation?
A. In order to answer that question it is necessary to go back to the history of the tax itself, which was enacted by the general assembly in 1935 as a result of a two year survey conducted by the special tax commission appointed by Ex-Governor Cross in 1933. This commission recommended that a franchise tax be imposed based upon the income which is reported to the Federal Government, with the exception that interest and rent paid are not deductible.

With the enactment of this statute, and because of the fact that no other state in the country in imposing corporate taxes disallowed rental payments, it was necessary for the department to establish some definite application so far as the term "rent" was concerned. In so doing, the department requested of several of our large truck transportation [fol. 85] companies—in connection with a large chain store that does operate in Connecticut, we suggested that they furnish to us experience tables so far as the cost of operation of trucks is concerned. It was found that in the various cases submitted, that the percentage applicable to the use of the truck itself varied anywhere from 37 to 43 and

44 per cent. The department realizing that it would be impracticable to establish a separate ratio for each individual corporation, there being 12,000 of them, decided to strike a happy medium and disallow 40 per cent as a rental charge for the use of equipment. This ratio has been universally applied and to my knowledge has never been questioned in the courts until the present time.

The particular taxpayer, which is one of our largest taxpayers incidentally, did threaten to bring suit to settle the question. However, after going into the matter very thoroughly they agreed that perhaps 40 per cent was fair, both to the State and to the taxpayer, and ever since that time we have applied the use of the 40-60 ratio.

Q. So that 40-60 ratio was based on the experience of trucking companies?

A. That is correct.

Q. Those included what companies?

A. The Consolidated Motor Lines, the Seaboard Freight Lines, the McCarthy System, the Adley Express, and two or three others.

Q. And the Atlantic & Pacific?

A. The Atlantic & Pacific Tea Company happened to be the taxpayer to whom I made reference.

Q. It is on the basis of that experience of the trucking companies themselves that this 60-40 per cent is what is——

A. Determined.

Mr. Gaffney: That is all.

Cross-examination.

By Mr. Coleman:

Q. Mr. Steege, this problem about the 60-40 was first raised in connection with the A & P?

A. In 1936, that is correct.

Q. These truckers that supply the A & P are short haul [fol. 86] as distinguished from long haul truckers, such as Spector, are they not?

A. I would not say so.

Q. The ones that you mentioned specifically have to have their trucks in their own garages every night, do they not, and do as a matter of practice?

A. I wouldn't say so.

Q. You don't know, do you?

A. I do not.

Q. You do not. Besides that, Mr. Steege, the truckers whom you have described here are contract carriers, are they not?

A. That is correct.

Q. They are not common carriers such as the Spector?

A. I could not say definitely.

Q. You do not know as to that point?

A. No, I do not.

Q. The statute in its language—just a moment, please. (Pause.) Maybe you can find it for me quicker, but would you find for me in the statute the passage which prohibits the deduction of rent as a credit (handing book to the witness)?

A. This is not the whole statute, Mr. Coleman. That particular section was not amended by the 1939 session.

Q. It may be this '35 (handing book to the witness).

A. What was your question again, Mr. Coleman?

Q. Yes, would you find that portion of the statute which prohibits the deduction of rent as a credit?

A. 419c, 1935 Cumulative Supplement.

Q. Would you mind reading into the record that portion which deals with that specific section?

A. It is necessary to read the whole section.

Q. All right.

A. "In arriving at net income as defined in section 417c, whether or not the taxpayer is taxable under the federal corporation net income tax, there shall be deducted from gross income all items deductible under the federal corporation net income tax law effective and in force on the last day of the income year, except (1) federal taxes on income or profits, losses of prior years, interest received from federal, state and local government securities and specific ex-[fol. 87] emptions, if any such deductions shall be allowed by the federal government and (2) interest and rent paid during the income year."

Q. So there is nothing in the statute about 60 per cent of rent being allowed, is there?

A. Definitely, no.

Q. That was a ruling by your department?

A. That is correct, sir.

Q. That is a rule of convenience or a rule of thumb adopted by your department?

A. It is a regulatory provision adopted by the department.

Q. When was that adopted?

A. Immediately upon the establishment of the law.

Q. You interpret money paid for the use of a truck, as rent under that statute?

A. We do, yes, a portion of it.

Q. You allow the taxpayer a portion of what you construe to be the rent?

A. That is correct.

The Court: I would like to ask one question.

Mr. Coleman: Yes, your Honor.

By the Court:

Q. Is that on the basis that you consider from your experience that a specific percentage of this amount paid for trucks is what is defined as rent?

A. Rent for the use of the equipment itself. The idea was, Judge, to distinguish between the use of the vehicle itself or the piece of equipment, so to speak, from other normal expenses incurred in the operation of the piece of equipment. We make that distinction also, I might add, with respect to the use of road building equipment which is commonly rented from one contractor to the other.

By Mr. Coleman:

Q. I show you a paper and ask you if you are familiar with that paper or the original from which it was copied.

A. Yes, sir.

Q. What is that?

A. This represents a memorandum written by Assistant Attorney General Joseph P. Smith concerning the case of the A & P stores.

[fol. 88] Q. That is dated November 20, 1939?

A. That is correct.

Q. Does that refresh your recollection as to about the date when this practice of 60-40 was adopted by your department?

A. No. I must say that the 60-40 ratio was adopted back in 1936. In order to clarify your question I would have to go into the history of the case of the A & P.

Q. Even though it was adopted in 1936, the Attorney General was not consulted about it until 1939; is that correct?

A. There was no official opinion rendered on it until 1939. That is correct.

Mr. Coleman: I offer an opinion from the Assistant Attorney General, Joseph P. Smith, in evidence as incorporating the policy of the department under which it is bringing this action.

Mr. Gaffney: Objection is made, your Honor, on the basis that an Attorney-General's opinion is not binding on any department of the state government, and is purely and simply the opinion of an individual. Even though he might be connected with the state government, nevertheless it has no more force and effect on the state department, if an administrative head of the state government wants to ignore it, any more than a man on the street. It is purely hearsay.

Mr. Coleman: It is my understanding from the testimony of the witness that the opinion conforms in fact to the practice obtaining in the department.

Mr. Gaffney: The opinion itself carries a number of citations in here which obviously cannot have any bearing on the case in question, and it is quite beyond the whole question here, your Honor.

The Court: Do you claim it as relevant to the question of the administration of this tax——

Mr. Coleman: 60-40, that phase of the tax action, that is what this opinion is concerned with. And as I understand it, the department is in accord with the opinion here rendered on the 60-40.

[fol. 89] The Court: It may be admitted.

(Plaintiff's Exhibit 19: Three sheets, copy of letter, November 20, 1939, to Hon. Charles J. McLaughlin from Francis A. Pallotti, Attorney General, By Joseph P. Smith, Assistant Attorney General.)

Mr. Coleman: That is all.

Mr. Gaffney: That is all.

Mr. Coleman: Are you going to rest now?

Mr. Gaffney: Yes.

SIMON FISHER, recalled as a witness on behalf of the plaintiff, in rebuttal, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Coleman:

Q. Mr. Fisher, you have been sworn. The last witness, Mr. Steege, told us about certain figures which he collected from contract carriers supplying such institutions as the A & P. From your experience as a trucker and the type of business that you are in, are figures collected from that type of carrier a fair index of the comparable for long-haul carriers such as the Spector?

A. No, sir, they are not.

Q. What is the difference.

A. Well, there are many differences. The road cost per mile of operation on a long haul is in many ways higher than the per mile road cost on a short haul. Now the companies he mentioned are comparatively short-haul lines going from New York, extending generally from New York to points in Connecticut and Massachusetts. But their trucks will go from their terminal in New York, for instance, to a terminal in Bridgeport, at which terminal their load is delivered. The truck may go from there into a garage and be serviced or checked. It may go out the next day or that night to another intermediate point. At no time will the road outfit travel for an extended uninterrupted trip of, I would say, more than a hundred miles or perhaps 125 miles at the very most. [fol. 90] The cost per mile of a long-haul operation for motor fuel—in the first place, you need much larger and heavier equipment to run across the mountains that we go—through Pennsylvania and also around Buffalo and upper central New York. The tires, for instance, they use, short-haul operation, that has many stops. And their weight is much—their average tonnage per truck-load is less, and therefore they do not need tires with as large a weight, load carrying capacity, as the long-haul. They use usually—since they use smaller tractors—many of them are Fords and Chevrolets and lighter equipment, even though they might use Whites or International. They use 9.20 tires, some of them even smaller size, whereas ours are 10.20.

There is a terrific amount of heat generated in our trucks, in a tire going 250 or 300 miles at a time without stopping. And they do drive—they will maybe stop for a half hour or so. There are many other costs. The maintenance costs are much lower on a short haul because that is a short haul intermediate point operation, where their operation consists of service from one terminal to another within a small geographical area. The trucks are in a garage or subject to maintenance and service practically every night, which lowers the maintenance cost. And many other factors of that kind would not make the short-haul cost comparable.

That is compensated for, that is, the higher road operating cost of the long-haul trucker, so to speak, is compensated for by the fact that his revenue per ton mile is ordinarily higher due to the fact that he loads his trucks heavier and can load them heavier because there is no need for so much interruption of loading and unloading. But as far as the operating cost per mile, it is much higher than short-haul. These A & P carriers, of course, there is no basis at all to compare that type. They are more of a city to city and store to store warehouse to store, operation, with many stops and starts and the truck is at rest; oh, I would say one-third of its life it is not even working, or maybe perhaps [fol. 91] more than that, which makes a big difference in the matter of wear and tear, etc.

Mr. Coleman: You may inquire.

Cross-examination.

By Mr. Gaffney:

Q. That is not true about Consolidated, is it, Mr. Fisher?

A. The latter part is not quite applicable to Consolidated, but I would say Consolidated is what we call a short-haul operation. They go from Connecticut to New York and they have intermediate terminals in between.

Q. Consolidated delivers out to Chicago, does it not?

A. Consolidated?

Q. Yes.

A. Not as far as I know.

Q. Are you sure about that?

A. I would say not. Consolidated Motor Freight Lines?

Q. That is right.

A. Is that the Arbors?

Q. It formerly used to be Arbors.

A. I would say not, sir.

Q. Consolidated owns over 800 trucks, don't they?

A. Oh, yes, it is a large operation. They serve all these small towns throughout Connecticut, and I think some in Massachusetts and down to New York.

Q. They make long hauls?

A. They are not what we call a long operation.

Q. If they haul to Chicago, it is a long haul.

A. I think I will have to differ with you, Mr. Gaffney. They do not haul to Chicago. If they do, I haven't been awake for a long while.

Q. If they do, what you said does not apply to those trucks that haul to——

A. Evidently their road costs would be the same as ours. Any trucks that would go from Connecticut to Chicago.

Q. It is an interstate carrier. Consolidated is, is it not?

A. Yes, but it is not the nature of their operation that determines the cost. It is the geographical distances and the terrain that they must go through, and it is the steadiness and consistency of the use of the truck on the road, the wear and tear, the heat generated by the tires by steady [fol. 92] pounding, hour after hour. They have many stops that the long hauls do not have. Can't stop——

Q. It is quite possible that a short-haul truck with the braking and starting and stopping and red lights, etc., has greater wear and tear than a long-haul truck does.

A. They may have some more brake wear.

Q. What about engine wear and the shifting of gears?

A. Well, of course they are trucks and they are made for that. The number of starts and stops on the engine wear, while in that way they may have a little more wear—but the only thing that wears out a truck or a motor is heat. And heat comes from steady grinding, hour after hour, without giving the motor a chance to cool off, and the same thing is true of tires.

Q. Don't you think a motor gets heated in low gear when it is left in, and starting in low or second and high?

A. Of course, there is a certain temperature of heat that we all know that a motor must generate in order to operate at its highest efficiency. It is the steady pounding of those moving parts under that heat, and higher, without a chance to cool off. The ordinary heat of a motor to operate at

highest efficiency would be about 180 degrees. I believe it is about that.

Q. Is Adley an interstate carrier?

A. Adley operates between New York and Connecticut lines.

Q. Is McCarthy an interstate carrier?

A. McCarthy is an interstate carrier. Those are all what we call short-haul. McCarthy has Connecticut and Massachusetts dotted with his terminals all over, and those trucks go 25, 35, 45, 50 miles from one terminal to another. And on the other hand I might say this too, that McCarthy, Consolidated, Byrolly whom I think has been bought out by Consolidated, a much larger proportion of their equipment is small, virtually pick-up equipment, sixteen foot trailers and sixteen foot chassis on their trucks, because they only go short distances and can only accumulate a comparatively small amount of tonnage within a definite time and they can- [fol. 93] not use these great big twenty, ten ton outfits, and fifteen ton outfits.

Q. Consolidated does, does it not?

A. They do have large outfits. I mean the proportion of it. We have none of that small equipment. We could not possibly transport from Chicago to New York on any kind of an economic basis because of this relative cost, one of the things.

Q. It is quite possible that the deterioration of a truck is greater on a short haul than on a long haul, is it not?

A. It is possible, but from my experience and my knowledge and contact with the industry and study of the figures, I would say that that is not the case.

Mr. Gaffney: That is all.

The Witness: I would say that the cost per mile of operation on a long haul, and that is a thousand mile haul like ours, is higher.

Mr. Coleman: That is all.

Mr. Gaffney: Just one question.

By Mr. Gaffney:

Q. Does the Internal Revenue Bureau allow a larger percentage depreciation on long-hauls than on short-hauls?

A. Depreciation, you mean for obsolescence?

Q. And deterioration.

A. On the truck?

Q. Yes.

A. I do not know, but I do not think so. I do not think for federal income tax purposes they pay any attention to it. They regard a truck as having a uniform life for the purpose of the federal income tax act, and I do not know whether they make any distinction. I would say they probably do not.

Q. And this state tax is patterned after the federal tax, except with the exception of rent and interest?

A. So I am informed.

Mr. Gaffney: That is all.

Mr. Coleman: The plaintiff rests, your Honor.

Mr. Gaffney: We rest.

Mr. Coleman: We both agree that this is a case that [fol. 94] ought to be briefed rather than argued, unless your Honor feels differently.

The Court: No. If you wish, you may submit briefs. How much time do you want?

Mr. Gaffney: A minimum of two weeks, Your Honor.

(Discussion regarding briefs.)

The Court: Briefs by July 1.

Mr. Gaffney: We will stipulate that the cost be split between the two sides on the Court's transcript.

(Hearing closed at 2:40 P. M.)

Reporter's certificate to foregoing transcript omitted in printing.

[fol. 95] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION FOR PERMISSION TO SUBMIT ADDITIONAL EVIDENCE—October 28, 1942

The Defendant in the above entitled case requests of this Honorable Court's permission to submit additional evidence for the reason that:

1. Such evidence is pertinent and material to a decision in this case.

2. The evidence desired to be submitted is newly discovered and was not available as of the date of the hearing before this Honorable Court on this case.

The Defendant. By Francis A. Pallotti, Attorney General. Leo V. Gaffney, Assistant Attorney General.

[fol. 96] In United States District Court District of Connecticut Hartford, Connecicut

Civil Action. File No. 723

Spector Motor Service, Inc. a Corporation, Plaintiff,

v.

Charles J. McLaughlin, Defendant

Statement of Evidence

Minutes of continued hearing held on Friday, November 6, 1942, at 11:30 A. M. on the following matters:

(1) Motion to substitute party defendant.
(2) Additional evidence.

Before: Honorable J. Joseph Smith, District Judge.

Appearances:

For the Plaintiff Day, Berry & Howard, Esqs. 750 Main Street, Hartford, Connecticut. By Cyril Coleman, Esq. Nair & Nair, Esqs. City Hall Building, New Britain, Connecticut. By Israel Nair, Esq.

For the Defendant Honorable Francis A. Pallotti, *Attorney General* By Leo V. Gaffney, *Assistant Attorney General.*

Mr. Coleman: Your Honor, I have a motion to which there is no objection. It has been on file for some time. It [fol. 97] is dated September 3. And it is a formal motion to substitute Walter Walsh who is the present tax commissioner, and I understand from Mr. Gaffney that there is no objection to the granting of that motion.

Mr. Gaffney: No objection.

The Court: The motion may be granted.

I understand there is no objection to permission to submit additional evidence, although there may be an objection——

Mr. Coleman: (Interrupting)—to the evidence itself, that is right. I have no objection to the case being reopened for the purpose of taking evidence.

Delbert Harold Rau, called as a witness on behalf of the defendant, being first duly sworn by Clerk Hector, testified as follows:

By Clerk Hector:

Q. What is your name, please?
A. Delbert Harold Rau.
Q. Where do you live?
A. 175 Francis Street, New Britain.

Direct examination.

By Mr. Gaffney:

Q. What is your position, Mr. Rau?
A. Office manager, New Britain Rationing Board.
Q. That is the New Britain Division of the OPA?
A. Yes, sir.
Q. How long have you been the office manager of the New Britain Division of the OPA?
A. January 1st.
Q. You have appeared here under a subpoena, Mr. Rau?
A. Yes.
Q. You were directed to bring an application with you, were you not?
A. I have those applications.
Q. Was there an application made to the New Britain Rationing Board for tires by the Spector Motor Service Company?
A. Yes.

Mr. Coleman: I objected to that, your Honor. The application is the best evidence of that fact.

[fol. 98] The Court: A preliminary question, I assume, for the production of the offer, of the application.

Mr. Gaffney: That is right.

The Court: It may be admitted as preliminary.

By Mr. Gaffney:

Q. The answer, Mr. Rau?

A. I have applications in my possession that I brought with me.

Q. Application of the Spector Motor Service, Incorporated?

A. Yes, sir.

Q. For tires?

A. That is right.

Q. Would you produce them, please?

A. There are two applications. (Witness produced papers.)

Q. And the date of these?

A. This was 10/8/42. This is 10/8/42.

Mr. Coleman: I show you this application, your Honor, and object to it on the ground that it does not appear from the application that it is signed as the regulations on the back require, by a person who is an officer of the corporation or its duly authorized agent. It is signed by one Thomas Cooty, I believe, who I am informed is a lessee of the Spector Motor Service but certainly no officer, agent, or officer with the duly authorized power as required by the regulations themselves as you will see from the back of the application, and I may add that anyway it seems to me that the application is immaterial as bearing on the issues in the case, because whether or not an application is filed in Connecticut for a tire it seems to me has no bearing on the issues as they were produced in Court here sometime ago.

Mr. Gaffney: The point I make on that is this, if your Honor please. On that application is the question "How many trucks are under the jurisdiction of the local rationing board?" And the answer to that shows "200 trucks", which is the entire fleet. If that is true, it has a direct bearing on the case. I might clear up that question of the regulations on the back. I might ask Mr. Rau another question on that, if your Honor permits.

[fol. 99] The Court: "Garaged or stationed within the jurisdiction of the board".

Mr. Coleman: You will recall, your Honor, that at the trial there was evidence developed that I believe there were five trucks stationed in Connecticut as a part of the interstate business, and that they were these pick-up trucks which ran

around Connecticut picking up freight and bringing it into the terminal where it was to be sorted on its way West.

It seems to me this application does not show any inconsistency with our position as maintained at that trial, that those were a part of the pick-up service incident to interstate commerce; and that, therefore, this application does not indicate anything to the contrary.

Mr. Gaffney: If your Honor please, if there are 200 trucks, which is the entire fleet, garaged or stationed within the jurisdiction of the New Britain Board, it certainly is evidence of the fact that this is the situs, domicile of a business in the state of Connecticut, and they actually are doing business in the state, and for that reason I am introducing this.

The Court: Do you seriously contend that 200 trucks are actually garaged in New Britain and have their headquarters there, in view of the testimony which was already introduced as to the nature of the leased premises in New Britain?

Mr. Gaffney: I might say this, your Honor. This is an application. The applicant in the first line is set out to be the Spector Motor Service, Incorporated. The tires, if any, are issued to the applicant, not to——

The Court: (Interrupting) The applicant's principal office is stated to be in New Britain, in this application, although considerable evidence has already been introduced that that is not the principal office.

Mr. Gaffney: On the other hand, this is not my statement. I did not fill out that application. This is an application of the Spector Motor Service Corporation. They are condemning themselves through their own mouths. [fol. 100] And this is the evidence we want to put in here.

The Court: The Court would like to know if the state, or the defendant, claims that the principal office or the place where 200 vehicles are garaged or stationed, is as a matter of fact in New Britain.

Mr. Gaffney: Well, it may not be. But the company here has made an application stating that to be the fact. Now, if the Company states that to be the fact for the purposes of conducting Connecticut business and getting tires through Connecticut, and states on an application in another jurisdiction a different set of facts, I do not see why we should inquire into that, your Honor, because they have condemned themselves, as I have said before, in their

own application here, as doing a Connecticut business and being domiciled to do a Connecticut business. And that is the point of this application, why I am asking to have this application admitted. They have denied——

The Court: (Interrupting) If there is any contention seriously that these statements are true, of course it would be a question on which evidence, proper evidence, would be admissible. The Court, however, does not believe that the parties should attempt to try here the question of whether or not there is any violation of the price administration regulations.

Mr. Gaffney: That is not what I am seeking, your Honor. If your Honor recalls back to the case, the one question which was in issue was whether or not they were actually conducting a Connecticut business. That is the nub of the case. We contended right along, with their warehouse in New Britain and the Connecticut business they do, that they were, under the cases, conducting a Connecticut business—and also with the registration with the Secretary of State as a foreign corporation doing business in the state of Connecticut. To supplement and add an additional facet to the diamond, we are submitting this application made by the Spector Motor Service Corporation to the New Britain Rationing Board. The fact alone that the Spector [fol. 101] Motor Service Company applies to the New Britain Rationing Board, is evidential of the fact that they are conducting a business in the state of Connecticut.

Secondly, the fact that they have alleged on that application that there are 200 trucks within the jurisdiction of that Board, is an additional fact, that they are operating and doing business in the state of Connecticut. Whether or not it is true, they have stated that fact themselves. I did not make out that application. And the point I am making is——

The Court: (Interrupting) And you do not seriously contend that that is the fact?

Mr. Gaffney: I seriously contend that they have committed themselves to that fact. And I claim that each one single operation does not make up the doing of a business in a state. But when you combine a lot of operations such as the filing with the Secretary and all these numerous things that were brought out in the trial, plus this which I feel is clearly evidential, your Honor, and will supple-

ment and add to and just draw the noose tighter around the whole question, showing there actually has been and is being conducted in the state a business by the Spector Motor Service Corporation, for this reason I believe this is additional evidence which was not available, which is admissible and bears exactly on the point in controversy.

Mr. Coleman: All I say, your Honor, if such admission is to be tortured out of this application, the preliminary should be observed by showing that it was made by a duly authorized agent of the corporation. Of course, if they cannot show that, neither can they show the fact which they are attempting to prove by this application.

Mr. Gaffney: I might add further, your Honor, another feature of this case was that Spector did not own any of his trucks. They were all owned either by independent operators or the Wallace Transportation Company. I just want to show that the Spector Company have admitted and acknowledged the fact that they are doing business [fol. 102] in the state of Connecticut, when they applied to the Local Rationing Board in New Britain for tires. If they were not they would not be entitled to the tires. They would have to go to whatever place they were doing business to get their tires, your Honor.

The Court: Of course I have not had time to go through this application thoroughly. Is it your contention that you are merely putting in the application which shows that the nature of the business for which these tires were to be used is the carriage of goods from point to point within the state?

Mr. Gaffney: I don't care about that, your Honor. I am not making that claim, your Honor. I don't care what they do once the tires are issued. The very fact that they made application to the New Britain Rationing Board is the fact that I want to have your Honor take cognizance of. In making application to the New Britain Board they have acknowledged they are doing business in New Britain and they are within the jurisdiction of the New Britain Rationing Board. In other words, as I said before they would not be entitled to any tires. They would have to go to the Rationing Board where they did business and get their tires from that Rationing Board. I don't care, your Honor, what happens to the tires after they are issued.

Mr. Coleman: There was a second one offered by Mr. Gaffney. I do not know whether it bears the same legend

as the firs' one. You will notice after 8(k) there is a statement that it is to be used as an interstate commerce carrier. And I notice there is the same thing mentioned in the one your Honor has just been reading, right under 8(k).

The Court: What is the position of counsel on the question of the authority of the person who purports to have signed these applications?

Mr. Gaffney: I might ask Mr. Rau a question or two on that. Perhaps it might clear it up.

By Mr. Gaffney:

Q. Mr. Rau, was there a regulation that the application had to be signed by either an officer or the specified agent?

[fol. 103] Mr. Coleman: I object to that.

Mr. Gaffney: You just mentioned it yourself that it is expressly on the back of this application.

Mr. Coleman: On the back of that application. That is the best evidence.

That is oral testimony.

Mr. Gaffney: I was just asking him to affirm whether or not that was the regulation. He will affirm it, I believe.

Mr. Coleman: I object to it because I want to stick to the best evidence.

The Court: It may be excluded.

By Mr. Gaffney:

Q. Mr. Rau, was that the regulation as it was printed on the back of the applications? Was that amended and changed later?

A. There have been many amendments.

Q. Is there a regulation now that, before anyone is permitted to obtain tires, the application must be made by either an officer or a specified agent?

Mr. Coleman: I object to that on the same ground, the best evidence. It is not proper, I submit that there be oral testimony about a regulation which may be proved in the best evidence by producing the regulation itself.

The Court: It may be excluded.

By Mr. Gaffney:

Q. Mr. Rau, who made this application to the New Britain Rationing Board?

Mr. Coleman: I object to that because it appears already by the best evidence that it was by a man named Thomas Cooty.

Mr. Gaffney: I beg your pardon. I take exception to that. The applicant is stated in the first line, the name of the applicant.

Mr. Coleman: Then it appears by the application that it is unnecessary and improper for a witness to try to prove it orally, so I object on the same ground.

[fol. 104] Mr. Gaffney: He has already so testified, in any event, that the application was made by the Spector Motor Service, Incorporated.

Mr. Coleman: I pursue my objection.

The Court: It may be excluded.

By Mr. Gaffney:

Q. To whom were these tires issued, Mr. Rau?

A. Spector Motor Company?

Q. Was the Spector Motor Company the applicant——

Mr. Coleman: I object on the same ground. The same question and same ground.

By Mr. Gaffney:

Q. Let me rephrase it, Mr. Rau. Were the tires then issued to the applicant?

A. Yes, sir.

Mr. Coleman: I object to that, your Honor, because that is a conclusion, and ask that the answer go out.

The Court: It may be excluded.

By Mr. Gaffney:

Q. But you have testified that the tires were issued to the Spector Motor Service, Incorporated?

A. Yes, sir.

Mr. Gaffney: Now, your Honor, I offer those as exhibits.

The Court: They may be admitted.

Mr. Gaffney: That is all.

The Court: They may be marked.

Mr. Gaffney: That is all the evidence I was prepared to submit at this hearing, your Honor.

Mr. Coleman: And we have no evidence, your Honor.

The Court: Since the Plaintiff's Exhibits are numbered these may be marked Defendant's Exhibits A and B.

(Defendant's Exhibit A: Application to Rationing Board, dated October 8, 1942.)

(Defendant's Exhibit B: Application to Rationing Board, dated October 8, 1942.)

(Hearing closed at 11:53 A. M.)

[fol. 105] Reporter's certificate to foregoing transcript omitted in printing.

[fol. 106] In United States District Court, District of Connecticut

Civil No. 723

Spector Motor Service, Inc.

v.

Charles J. McLaughlin, Tax Commissioner, Walter W. Walsh, Substituted, Defendant

Memorandum of Decision

Plaintiff, a Missouri corporation, has its principal office in Illinois. It is engaged in motor transport of goods between points in the Midwest and points in the Northeast. It pioneered in two-way hauls, establishing terminals in each zone for bringing together, sorting, loading, and unloading and distributing freight handled in the long-haul trips. The terminals are of two types, leased terminals used solely by plaintiff, and agency terminals where the plaintiff has the use of terminal facilities or some other carrier.

The plaintiff, at the request of one of its Connecticut lessors, registered as a foreign corporation in the state of Connecticut and paid the minimum license fee. It maintains terminals (leased) at Bridgeport and New Britain, with office furniture owned by it, and some five pick-up trucks held by it under conditional bill of sale, registered and used solely in Connecticut. It maintains staffs to handle freight

at both terminals, as well as to handle local bookkeeping. A sales staff is maintained and paid at the New Britain office. The usual method of payment of salaries and bills at the Connecticut offices is by draft on the corporation at Chicago. Some cash is kept at New Britain for the payment of incidental bills. From one-third to one-half of the dollar volume of the plaintiff's business originates in Connecticut. [fol. 107] The plaintiff does not engage in any hauls which both originate and terminate in Connecticut or in any other single state. All its long-haul trucks are leased by it from a corporate affiliate, Wallace Transport Company, an Illinois corporation, which owns most of the trucks and obtains some others by lease from individual owner operators.

The State Tax Commissioner, on this state of facts, has determined that plaintiff is subject to the Corporation Business Tax Act of 1935, as amended, as a corporation carrying on business in this state. He has determined that the income of the plaintiff is derived from the manufacture, sale, or use of tangible personal or real property, and that, therefore, the allocation fraction of Sec. 420 c(3)(b), 1935 Supp. to G. S., (Sec. 356 c(3)(b), 1939 Supp. to G. S.) should be applied to determine what portion of the net income of the corporation is attributable to business within the state.

The tax is stated in the Act to be a tax or excise upon the franchise of a corporation for the privilege of carrying on or doing business within the state, measured by the entire net income, as therein defined, received by such corporation from business transacted within the state.

Forty percent of the cost of purchased transportation has been ruled by the Commissioner to be "rent" and not deductible in determining net income under the Act.

The total assessment laid against the plaintiff for the period from June 1, 1937 to December 31, 1940 aggregated $7,795.50 as of January 7, 1942.

Plaintiff seeks to enjoin defendant from proceeding against the plaintiff under the Tax Act, and also seeks an adjudication as to the liability of the plaintiff under the Act, claiming (1) that the assessments are illegal and void as a burden to and direct tax upon interstate commerce in violation of Article I, Section 8, of the Constitution of the United States, and Section 1 of the 14th Amendment; (2) that they are unfair and discriminatory in violation of these sections and of Sections 1 and 12, Article I of the Connecti- [fol. 108] cut Constitution in that there is discrimination in

assessments between plaintiff and others in the same business; (3) that there is an unconstitutional delegation of power to the defendant in violation of Article II, Constitution of Connecticut, and Amendment 14, Section 1, Constitution of the United States; (4) that the assessments are not authorized by the statute; and (5) that the assessments are based on inaccurate computations.

It is agreed that no plain, speedy and efficient remedy may be had in the state courts either by appeal, *Lathrop* v. *Norwich* (1930) 111 Conn. 616, or by injunction, *Waterbury Savings Bank* v. *Lawler*, (1878) 46 Conn. 243.

Since no interlocutory injunction is sought, the case is properly before this court rather than the three-judge court established under Section 266 of the Judicial Code (28 U.S.C.A. 380). *Smith* v. *Wilson*, (1926) 273 U. S. 388.

The case being properly before this court, the court has jurisdiction to determine all the questions of the case, local as well as federal. *R. R. Commission of California* v. *Pacific Gas and Electric Company* (1938) 302 U. S. 388.

In leasing its terminals in Connecticut, operating owned and leased pick-up trucks, maintaining local office and terminal staffs as well as representatives to maintain contact with Connecticut shippers, plaintiff is carrying on business in its corporate capacity within the state of Connecticut. Yet all its business is in interstate commerce.

Does the statute apply to a corporation so situated, and if so, is it constitutional?

The statute is open to two possible interpretations. If the "tax or excise upon its franchise for the privilege of carrying on or doing business within the state" levied by the Act upon "every other corporation or association carrying on or having the right to carry on business in this state", extends only to those corporations or associations engaged in or having the right to engage in intrastate commerce, as the plaintiff contends, the plaintiff is not included [fol. 109] in its terms and no federal constitutional question arises under the commerce clause.

If, however, the provisions of the statute extend to corporations or associations engaged solely in interstate commerce, the Act may apply to the plaintiff, and the state's power to apply it must be tested under the commerce clause.

Of two possible interpretations, that which sustains the constitutionality of the statute must be adopted in prefer-

ence to that which would require that the statute be declared unconstitutional. *Anniston Mfg. Co.* v. *Davis* (1937) 301 U. S. 337. *Federal Trade Commission* v. *American Tobacco Co.* (1924) 264, U. S. 298, 307. *Panama R. R. Co.* v. *Johnson* (1924) 264 U. S. 375, 390. *Blodgett* v. *Holden* (1927) 275 U. S. 142, 148. *Camp* v. *Rogers* (1877) 44 Conn. 291. *Ferguson* v. *Stamford* (1891) 60 Conn. 432.

The constitutionality of the statute under the state's interpretation of its meaning becomes material, therefore, in arriving at a decision on the intent of the legislature in its enactment.

The first ground of alleged unconstitutionality is that the tax is a burden on interstate commerce. The question raised under the facts of this case is whether the state, in return for the protection given by it to a corporation carrying on its activities in large part in the state, may, in spite of the commerce clause, require that corporation to pay a tax based on that part of its corporate net income derived from its activities within the state, even though all of its activities in the state are carried on in interstate commerce.

If a corporation is engaged in both interstate and intrastate commerce, the state may levy a tax for the privilege of carrying on business in the state, on a base which takes into consideration net income from both types of business carried on within the state. *U. S. Glue Co.* v. *Oak Creek* (1918) 247 U. S. 321. *Western Live Stock* v. *Bureau* (1937) 303 U. S. 250. *Underwood* v. *Chamberlain* (1920) 254 U. S. 113.

"It is settled that a State may not directly burden inter- [fol. 110] state commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule". *U. S. Glue Co.* v. *Oak Creek* supra at 326.

The tax here involved is not a tax on gross income, but is based on net earnings, and is, therefore, not within the prohibition of *Crew Levick Co.* v. *Pa.* (1917) 245 U. S. 292, if some intrastate business is transacted by the taxpayer.

Nor is it discriminatory, since it applies alike to corporations in the same business, whether domestic or foreign.

There is a serious question as to the fairness of the method used in allocating forty percent of the cost of purchased transportation as "rent" within the meaning of the statute, since the evidence is insufficient to determine accurately whether this was a fair approximation of the pay-

ments by this corporation properly allocable to this item. However, since the assessment of the tax must be held invalid on other grounds, this question need not be considered further here.

The inclusion of amounts properly classified as "rent" in the tax base as part of net income under the definition of the statute would not, in itself, be improper, since the state is not bound to accept the definition of net income used by the federal tax laws.

It may well be that net earnings applicable to all capital used in the business, whether the capital is contributed by lienholders, lessors, or shareholders, is a sounder basis for state taxation, both from the taxpayer's standpoint because a better measure of the value of the governmental services of the state to the taxpayer, and from the state revenue standpoint because less liable to violent fluctuation, than is the federal net income base. See *Report of the Connecticut Temporary Tax Commission* (1934) 455 ff. This is a matter of state legislative policy, and should not be interfered with unless there is an actual burden on interstate commerce.

If any part of plaintiff's business were intrastate commerce carried on in Connecticut, the tax might properly be [fol. 111] applied to it. However, there must be some intrastate business on which to base this tax, or its application to the plaintiff will be in violation of the commerce clause, as a regulation by the state of interstate commerce. *Cooney* v. *Mountain States Tel. Co.* (1935) 294 U. S. 384, 392, 393. *Matson Navigation Co.* v. *State Board* (1935) 297 U. S. 441. *Anglo-Chilean Nitrate Corp.* v. *Alabama* (1933) 288 U. S. 218. Here there is no intrastate business.

Nor would the plaintiff's voluntary acquisition of full corporate privileges to do intrastate business furnish a basis for the tax. *Anglo-Chilean Nitrate Corp.* v. *Alabama* supra. (Justices Cardozo, Brandeis, and Stone dissenting.)

The cases cited establish the rule that any state tax upon the privilege of doing business within a state, if the business done is solely in interstate commerce, is a burden on that commerce and, therefore, invalid.

Strong reasons of policy may be advanced for the state's position, that all business within the state, whether within or without the protection of the commerce clause, should be made to bear its fair share of the cost of running the state's

governmental institutions by a tax measured in some way by the benefits derived, without discrimination between local and out-of-state corporations, or between intrastate and interstate business. See the dissenting opinion of Mr. Justice Black in *Gwin* v. *Heneford* (1938) 305 U. S. 442 ff.

However, until the present interpretation of the commerce clause, prohibiting taxation by the states of the privilege of doing business solely in interstate commerce, is changed by modification of the rule by the Supreme Court, or by establishment of uniform methods of taxation of interstate commerce by the Congress, under the powers granted to it by the commerce clause, the present tax act must be held invalid if construed to apply to the plaintiff.

It must, therefore, be held that the "tax or excise upon its franchise for the privilege of carrying on or doing busi- [fol. 112] ness within the State" levied by the Act upon "every other corporation or association carrying on, or having the right to carry on, business in this State" means a tax upon the exercise of a franchise to carry on intrastate commerce in the state, and does not apply to foreign corporations or associations, which, during the taxable year, did not carry on, and had no right to exercise the privilege of carrying on or doing, intrastate business in the state.

Whether plaintiff might have been subject to the tax, after the amendment of 1937, adding the words "or having the right to carry on" business if it had qualified fully to do intrastate business in Connecticut, and whether, if the Act were interpreted as so providing, it would be valid under the Anglo-Chilean case, need not here be decided.

Under its Missouri franchise, filed with the Secretary of the State of Connecticut, plaintiff could do business only as a common carrier. By filing in Connecticut as a foreign corporation, it fulfilled one part of the requirements for carrying on its business within the state in intrastate commerce. Not having qualified with the Public Utilities Commission of Connecticut to operate as an intrastate carrier, however, it had not fully qualified to carry on its business in Connecticut, and had no right to engage in intrastate business in the state. Therefore, the statute does not apply to it, and the assessments are not authorized by the statute.

Judgment may be entered declaring that the plaintiff is not subject to the tax for the years in question, and enjoin-

ing defendant from attempting to collect from the plaintiff the tax for those years.

A decree may be submitted on three days' notice unless its form can be agreed on.

J. Joseph Smith, United States District Judge.

[fol. 113] In United States District Court

[Title omitted]

Findings of Fact and Conclusions of Law

Findings of Fact

(1) The plaintiff is a corporation incorporated under the laws of the State of Missouri, and has its principal office at Chicago in the State of Illinois. At all times mentioned herein, it has been, and is engaged in the carriage of freight by motor trucks which it leases from others.

(2) Defendant Walsh is a citizen of the State of Connecticut and a resident in said state, and is the Tax Commissioner of the State of Connecticut, having been appointed and duly qualified following the resignation from said office of the defendant McLaughlin.

(3) The matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.

(4) Under the laws of Connecticut, the plaintiff in appealing from the tax assessment referred to therein, is precluded from attacking in the state courts the constitutionality of the statute, because the statute which imposes the tax also provides for the appeal, and likewise is precluded from availing itself, in the state courts, of any other remedy provided by said statute under the law of Connecticut. The plaintiff is precluded from enjoining, in the state courts, the collection of said tax assessment.

(5) The said statute also provides for severe pains and [fol. 114] penalties for the non-payment of said assessment and for the failure to file returns. The plaintiff has neither paid the tax nor filed the returns for the years 1936-1940. The defendant's predecessor in office has already made demand for an additional 25% of the total taxes for those

years as computed by him as a penalty, together with interest, or a total penalty of $1672.73, as of January 7, 1942, and defendant threatens to place a lien on such of plaintiff's property as may be found in Connecticut, which lien will result in a substantial impairment of the plaintiff's interest business. In addition, the said taxing statute provides that failure to file a re urn with the defendant for two consecutive years shall cause a forfeiture of the plaintiff's corporate rights and powers.

(6) The plaintiff maintains an office and terminal at New Britain in the state of Connecticut, and a terminal at Bridgeport in said state, both of which are leased by it. The plaintiff utilizes, at these places of business in the state of Connecticut, office furniture and equipment, and freight handling equipment owned by it, as well as approximately five trucks used by it to pick up and deliver freight in the course of its business. The plaintiff has obtained one or more tires for these trucks through certificate issued by the ration board at New Britain, Connecticut. The plaintiff employs office personnel, sales representatives, and freight handlers, working in or from the office and terminals in the state of Connecticut. Plaintiff picks up and delivers freight within the state of Connecticut and utilizes its terminals for the purpose of sorting freight, loading and reloading it for forwarding and delivery.

(7) During the tax years in question, from approximately one-third to approximately one-half of the dollar volume of plaintiff's business originated within the state of Connecticut.

(8) During the years in question, plaintiff operated only over routes approved by the Interstate Commerce Commission, of which from 3% to 10% of plaintiff's route mileage was within the state of Connecticut.

[fol. 115] (9) During the years in question, plaintiff carried freight only from points within one state to points within another state, and carried no freight from a point within Connecticut to another point within the same state, for final delivery.

(10) During the years in question, plaintiff's employes, working in or from offices within the state of Connecticut, were employed solely in connection with the movement of

freight from points within one state to points within another state, and during this period, the terminals leased by the plaintiff, and the trucks and other equipment owned or leased by the plaintiff, were used solely in connection with the carriage of freight during the course of its transportation from a point within one state to a point within another state.

(11) At the request of one of its lessors, plaintiff filed with the Secretary of the State of Connecticut on June 11, 1934, a copy of its certificate of incorporation and a certificate of appointment of the Secretary of the State of Connecticut as its attorney for the service of process within the state of Connecticut, pursuant to Section 3488, Revised Statutes of Connecticut, Revision of 1930, and paid a fee in the amount of $50 in that year and in each succeeding year.

(12) The plaintiff is not, and has not been, authorized or qualified to carry on an intrastate motor carrier business within the state of Connecticut, but has been, and is, authorized by the Interstate Commerce Commission and by the Public Utilities Commission of the State of Connecticut, to carry on an exclusively interstate motor carrier business in or through the state of Connecticut.

(13) Section 418c of the 1935 Cumulative Supplement to the General Statutes of Connecticut, which became law on July 1, 1935, imposed on every corporation "carrying on business in this state" (with certain exceptions not here material) "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state".

(14) Purporting to act under said statute, the defend- [fol. 116] ant's predecessor in office assessed the plaintiff the sum of $618.36 as the tax due from the plaintiff for the year ending May 31, 1936, and the sum of $937.98 as the tax due from the plaintiff for the year ending May 31, 1937.

(15) Section 354e of the 1939 Supplement to the General Statutes of Connecticut, which became law on July 1, 1937, imposed on every corporation "carrying on or having the right to carry on business in this state" (with certain exceptions not here material) "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state".

(16) Purporting to act under said statute, the defendant's predecessor in office assessed the plaintiff the sum of $1113.56 as the tax due from the plaintiff for the year ending May 31, 1938, and the sum of $698.94 as the tax due for the six months' period ending December 31, 1938, and the sum of $1407.85 as the tax due for the year ending December 31, 1939, and the sum of $1346.08 as the tax due for the year ending December 31, 1940.

(17) With penalties and interest demanded, the assessments heretofore described aggregate $7795.50 as of January 7, 1942.

(18) Defendant's predecessor in office based the assessments on the net earnings of the plaintiff, in accordance with the formula contained in the statute, Section 420c (3) (b) 1935 Supp. to G. S., and Section 356c (3) (b) 1939 Supp. to G. S.

(19) In computing net earnings under said statute, defendant's predecessor in office disallowed as a deduction from gross income amounts considered by him as payments for rent of equipment, amounting to 40% of the cost of purchased transportation.

(20) No analysis of the experience of the plaintiff was made or attempted before the assessment to establish from the books of the plaintiff or of its lessors, the proportion of the cost of purchased transportation actually paid by the plaintiff as rent of the equipment used by it.

[fol. 117] (21) 40% of the cost of purchased transportation is a fair average cost of the rent of equipment by a carrier engaged in motor transportation of freight as determined by defendant's predecessor in office from an analysis of the books of a number of persons engaged in such motor transport business. The operations of these persons are not fairly comparable in the proportion of cost of rental of equipment with the operations of the plaintiff.

Conclusions of Law

(1) Plaintiff, during the years 1936 to the present, was and is engaged within the state of Connecticut solely in interstate commerce.

(2) Plaintiff, during the years 1936 to the present, was not and is not engaged within the state of Connecticut in intrastate commerce.

(3) Plaintiff, during the years 1936 to the present, did not and does not have the right to carry on business in intrastate commerce within the state of Connecticut.

(4) Plaintiff is not subject to the Connecticut Corporation Business Tax Act of 1935 as amended.

(5) Defendant's predecessor in office erroneously assessed corporation taxes against the plaintiff under the aforesaid corporation business tax act.

(6) Plaintiff has no adequate remedy under the laws of the State of Connecticut.

(7) This court has jurisdiction over the action and over the parties to the action.

(8) Plaintiff is entitled to a judgment declaring that the tax act in question does not apply to it during the years 1936 to the present.

(9) Plaintiff is entitled to a decree enjoining defendant from assessment and collection of the aforesaid tax.

J. Joseph Smith, United States District Judge.

[fol. 118] In United States District Court, District of Connecticut

Civil Action. File No. 723

Spector Motor Service, Inc.

v.

Charles J. McLaughlin, Tax Commissioner; Walter W. Walsh, Substituted Defendant

Judgment

This cause came on to be heard on June 16, 1942, and June 17, 1942, and was further heard on November 6, 1942, and was submitted to the Court on written briefs by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

1. That the defendant and his agents and subordinates are hereby enjoined from enforcing or collecting assessments levied upon the plaintiff by the defendant or his predecessors in office under the Corporation Business Tax Act, as amended, for the tax year ending May 31, 1938, for the

six months' period ending December 31, 1938, and for the tax years ending December 31, 1939 and December 31, 1940.

2. That the defendant and his agents and subordinates are hereby enjoined from proceeding in any manner against the plaintiff for failure to pay said assessments and the penalties accruing thereunder, and for failure to file tax returns under said Corporation Business Tax Act, as amended.

3. That the plaintiff is not subject to the tax provisions of the said Corporation Business Tax Act, as amended, for the tax year ending May 31. 1938, for the six months' [fol. 119] period ending December 31, 1938, and for the tax years ending December 31, 1939 and December 31, 1940.

J. Joseph Smith, United States District Judge.

Dated at Hartford, Connecticut, This 19th day of December, 1942.

[fol. 120] In United States District Court

[Title omitted]

Notice of Appeal to the Circuit Court of Appeals for the Second Circuit Under Rule 73 of the Rules of Civil Procedure for the District Courts of the United States

Notice Is Hereby Given that Walter W. Walsh, Tax Commissioner of the State of Connecticut, substituted Defendant for the named Defendant, Charles J. McLaughlin, Tax Commissioner, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final judgment for the plaintiff and against the defendant, entered in this action on December 19, 1942, and from each and every part thereof.

Dated Jan. 29, 1943.

Walter W. Walsh, Tax Commissioner of the State of Connecticut, by Francis A. Palfotti, Attorney General; Leo V. Gaffney, Assistant Attorney General.

To Clerk of the United States District Court for the District of Connecticut, New Haven, Connecticut.

[fol. 121] IN UNITED STATES DISTRICT COURT

[Title omitted]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL PURSUANT TO RULE 75 OF THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

Notice Is Hereby Given pursuant to Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, that Walter W. Walsh, Tax Commissioner of the State of Connecticut, substituted defendant for the named defendant, Charles J. McLaughlin, Tax Commissioner, designates the following to be contained in the Record on Appeal:

1. Summons.
2. All of the pleadings, including the complaint, the answer, the amendment to the complaint, the motion to substitute party defendant, the order substituting the party defendant and the application for permission to submit additional evidence.
3. All of the evidence, including all of the testimony and all of the exhibits which were placed in evidence.
4. The Court's opinion.
5. The Court's findings of facts.
6. Judgment.

[fol. 122] 7. Notice of appeal.

8. This designation.

Francis A. Pallotti, Attorney General. Leo V. Gaffney, Assistant Attorney General.

Dated: February 5, 1943.

[fol. 123] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION FOR WITHDRAWAL AND TRANSMISSION TO CIRCUIT COURT OF APPEALS OF CERTAIN EXHIBITS

To Honorable J. Joseph Smith, United States District Judge for the District of Connecticut:

Now comes Walter W. Walsh, Tax Commissioner of the State of Connecticut, substituted defendant for the named defendant, Charles J. McLaughlin, Tax Commissioner, the

appellant herein, appearing by Francis A. Pallotti, Attorney General for the State of Connecticut, and respectfully prays that the Clerk of the United States District Court for the District of Connecticut be authorized to withdraw from the file in this Court, and transmit to the Circuit Court of Appeals for the Second Circuit, the following exhibits:

Plaintiff's Exhibits 1 to 19 inclusive.
Defendant's Exhibits A and B.
Dated at Hartford, Connecticut, this 5th day of February, 1943.

[fol. 124] Consented to: C. W. Coleman, Day, Berry & Howard, Attorneys for Plaintiff-Appellee.

So Ordered: New Haven, Conn., February 5, 1943. J. Joseph Smith, United States District Judge.

Defendant-Appellant By Francis A. Pallotti, Attorney General; Leo V. Gaffney, Assistant Attorney General.

[fol. 125] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.
Dated, Hartford, Connecticut, February 8, 1943.

Francis A. Pallotti, Attorney General; Leo V. Gaffney, Assistant Attorney General, Attorney for Defendant-Appellant; Day, Berry & Howard, Attorneys for Plaintiff-Appellee.

[fol. 126] In United States District Court

[Title omitted]

Petition for and Order Extending Time for Docketing Record to April 30, 1943

Now comes the appellant herein by Leo V. Gaffney, Assistant Attorney General for the State of Connecticut, and respectfully prays that the appellant be given and have un-

til April 30, 1943 for docketing the record in the above mentioned case in the United States Circuit Court of Appeals for the Second Circuit. The extension is requested because of the necessity for further time for printing of the record and briefs.

Dated at Hartford, Connecticut, this 19th day of February, 1943.

Appellant, By Francis A. Pallotti, Attorney General.
Leo V. Gaffney, Assistant Attorney General.

[fol. 127] ORDER

The aforesaid Petition is hereby granted and the Appellant may have until April 30, 1943 for the docketing of the record in this case in the United States Circuit Court of Appeals for the Second Circuit.

Dated at Hartford, Connecticut, this 19th day of February, 1943.

J. Joseph Smith, United States District Court Judge.

Filed with me, under Rule 5(e), Federal Rules of Civil Procedure, this 19th day of February, 1943, at 3:45 P. M.

J. Joseph Smith, District Judge.

[fol. 128] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 129] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1943

No. 34

(Argued November 1, 1943. Decided December 24, 1943)

Spector Motor Service, Inc., Plaintiff-Appellee,

v.

Walter W. Walsh, Tax Commissioner, Defendant-Appellant

Before: L. Hand, Clark and Frank, Circuit Judges

Appeal from the District Court of the United States for the District of Connecticut

Action by Spector Motor Service, Incorporated, against Charles J. McLaughlin, for whom Walter W. Walsh has been substituted as successor, Tax Commissioner of the State of Connecticut, for an injunction and a declaratory judgment of its nonliability for the Connecticut Corporation Business Tax. From a judgment granting the injunction and the declaration prayed for, 47 F. Supp. 671, the defendant appeals. Reversed for judgment for defendant on the merits.

[fol. 130] Leo V. Gaffney, Asst. Atty. Gen., State of Connecticut, of Hartford, Conn. (Francis A. Pallotti, Atty. Gen., State of Connecticut, of Hartford, Conn, on the Brief), for Defendant-appellant; Cyril Coleman, of Hartford, Conn. (Israel Nair and Nair & Nair, all of New Britain, Conn., and Day, Berry & Howard, of Hartford, Conn., on the brief), for plaintiff-appellee.

Opinion

Clark, *Circuit Judge:*

This appeal by the Connecticut State Tax Commissioner brings up for consideration the validity of the Connecticut Corporation Business Tax of 1935, Conn. Gen. Stat., Cum. Supp. 1935, §418c assessed against the plaintiff, a Missouri

corporation having its principal place of business in Chicago, Illinois, and engaged in the interstate trucking of freight. The district court held that the statute, construed to avoid an unconstitutional burdening of interstate commerce, did not justify the tax assessed by the commissioner against the plaintiff for the period from June 1, 1937, to December 31, 1940, upon what he had found to be business done within the state. It, therefore, granted the plaintiff's prayer for an injunction against the assessment and collection of the tax and for an adjudication of its nonliability for the tax. D. C. Conn., 47 F. Supp. 671, 676. Jurisdiction was rested upon the constitutional issues and the diverse citizenship of the parties, the court holding inapplicable the prohibition of 28 U. S. C. A. §41(1), as amended in 1937, against federal injunction of state tax proceedings, because it found no plain, speedy, and efficient remedy in the state courts. Notwithstanding the fact that the parties were in agreement with the court on this point, we have found it not free of doubt. Since, however, we have concluded that [fol. 131] jurisdiction does exist, we shall postpone our discussion as to it until later,[1] and turn at once to the very interesting question of the extent to which an interstate trucking business can be subjected to a state corporate franchise tax based fundamentally on net income allocated and attributed to the business done within the state.

Plaintiff pioneered in the development of the "two-way haul" of goods between St. Louis, Missouri, and New York City, that is, the system whereby trucks which have come East with freight are supplied with another load for the return trip after a minimum holdover at the terminals. As developed, this involved the collection of freight in less than truckload amounts at certain eastern terminals, where it was sorted and the loads consolidated and placed in the returning trucks. Hence in 1934 and in 1935, plaintiff leased terminals for its exclusive use in Chicago, Illinois, and New Britain, Connecticut, in addition to those already in existence of St. Louis, Missouri, and New York City; and later it leased another in Bridgeport, Connecticut. It has also acquired agency terminals, where it has the use of terminal facilities of some other carrier, in certain cities in Massa-

[1] See "Jurisdiction of the Federal Court," pp. ——, ——, *infra*.

chusetts, Rhode Island, and New Jersey. Plaintiff utilizes about 150 trucks for its interstate hauling, almost all of these being leased from its corporate affiliate, the Wallace Transport Company of Illinois. For shipments less than truckloads these trucks are loaded and unloaded at the terminals, to or from which the goods are brought or delivered by separate pickup or cartage trucks, some leased from local truckers and some owned by plaintiff. Thus, at the New Britain terminal plaintiff has five such pickup trucks, all owned by it on conditional bills of sale.

At the New Britain terminal plaintiff has 17 employees, and at the Bridgeport terminal 10, including loading, ac- [fol. 132] counting, and sales personnel. Bills, as well as wages of employees, are usually paid by draft on plaintiff at Chicago, although some cash is kept in New Britain for incidental expenses. Plaintiff has a bank account in Bridgeport for collections made by its drivers, but no Connecticut employee is authorized to disburse this money. That is left entirely in the control of plaintiff's main administrative offices in Chicago, which handle all matters relating to rating and billing. Plaintiff has no real estate in Connecticut; its total physical assets there—outside of the pickup trucks—amount to only some $1,500 or $2,000 of office equipment in the two terminals. Between one-third to one-half of the dollar volume of plaintiff's business, however, originates in Connecticut.

When plaintiff negotiated for the lease of the New Britain terminal, the lessor, as a precaution in case of future litigation regarding the lease, required the company to qualify as a foreign corporation doing business in the state and to designate the Secretary of State as its agent for service of process. Plaintiff then paid the annual statutory fee of $50 and has since maintained its qualification, paying this yearly fee. It has not applied for or received the certificate of public convenience and necessity from the Connecticut Public Utilities Commission which is a prerequisite for the doing of local business as a motor common carrier. Conn. Gen. Stat., Cum. Supp. 1935, §577c, amended by Supp. 1939, §499c. Moreover, its permit from the Interstate Commerce Commission—granted under the so-called "grandfather clause" of §206(a) of the Interstate Commerce Act—limits its traffic, except for lines from St. Louis to Chicago and to Quincy, Illinois, to interzone hauling between the West

and the East. See *In re Spector Motor Service, Inc., Common Carrier Application*, 32 M. C. C. 443. Hence, although a very substantial part of its business originates within [fol. 133] the state, that business must go into interstate commerce and plaintiff has not engaged in purely intrastate business.

The Connecticut Corporation Business Tax Act of 1935, passed as a result of the recommendations of the Connecticut Temporary Tax Commission, Rep. 1934, 455 *et seq.*, imposes upon every corporation "carrying on business in this state" which has to file a report for federal income tax purposes, with certain exceptions not here material, "annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state, such tax to be measured by the entire net income as herein defined received by such corporation or association from business transacted within the state during the income year and to be assessed at the rate of two per cent," Cum. Supp. 1935, §418c,[2] with a further provision for a minimum tax, more specifically defined in §§421c and 422c. By §419c, net income is gross income less the deductions under the federal corporation net income tax, with certain exceptions which include "interest and rent paid during the income year."[3]

There follow special and ingenious provisions as to allocation of net income in the case of business carried on partly without the state. Sec. 420c (amended by Supp. 1939, §356e, Supp. 1941, §177f, and Supp. 1943, §292g) states: "If the trade or business of the taxpayer shall be carried on partly

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[2] Effective July 1, 1937, the legislature amended §418c, to apply to every corporation not merely carrying on, but also "having the right to carry on," business in this state. Conn. Gen. Stat., Supp. 1939, §354e.

[3] "Except (1) federal taxes on income or profits, losses of prior years, interest received from federal, state and local government securities and specific exemptions, if any such deductions shall be allowed by the federal government and (2) interest and rent paid during the income year." §419c. Net income is defined in §417c as "net earnings received during the income year and available for contributors of capital, whether they be creditors or stockholders, computed by subtracting from gross income the deductions allowed by the terms of section 419c."

[fol. 134] without the state, the business tax shall be imposed on a base which reasonably represents the proportion of the trade or business carried on within the state." Provision is then made for the allocation of certain specific receipts—interest, dividends, royalties, and gains on sales of assets—to the state of the principal place of business unless they can be "clearly established" as coming from local business or are sales or rentals of tangible property within the state—and the remainder of net income is to be allocated under rules and regulations of the commissioner, except in the case of income "derived from the manufacture, sale or use of tangible personal or real property." In the latter case the local income is found by use of an allocation fraction which is the mean or average of three ratios: (1) the ratio of tangible property in the state to all tangible property, (2) the ratio of wages and salaries paid within the state to all wages and salaries, and (3) the ratio of gross receipts assignable to the state to all gross receipts.[4] The commissioner computed the tax by use of this allocation fraction. Not great amounts are involved; the total tax for the 5½ years involved was $6,122.77, upon which the commissioner also claimed a 25 per cent penalty and interest.

Sec. 421c (amended by Supp. 1939, §357e, and Supp. 1941, §178f) provides for the minimum tax which is set up as an alternative to §418c, and requires the corporation to pay, whichever is the larger, either the tax already defined in §418c or the tax here defined of one mill per dollar based substantially on outstanding securities and corporate [fol. 135] stock and reserve. Sec. 422c contains provision for the allocation of this minimum tax in the case of business carried on partly without the state, which corresponds to the plan of §420c for the main tax. Since the minimum tax is not involved here, we need refer to these provisions no further than to point out the extensive and ingenious

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[4] Thus, for the year 1940, the commissioner found for the plaintiff's business the Connecticut tangibles to represent .071479 of the total, the salaries and wages to be .059896, and the receipts to be .341149, giving a mean, *i. e.*, one-third of the total, of .157508. The company's total receipts were $1,723,510.65, of which $587,973.59 arose in Connecticut; its net for apportionment was $426,291.01, of which $67,304.24 was allocated to the state with a tax of $1,346.08.

steps taken by the legislators in attempting to devise a fair system of allocation between business within and without the state and yet prevent a corporation from escaping what was thought to be its fair share of the tax. See *Lenox Realty Co.* v. *Hackett*, 122 Conn. 143, 187 A. 895, 107 A. L. R. 1306.

This objective is still further emphasized by § 423c, which provides that a company's officers, when believing that the allocation method applied to it by the commissioner has operated to subject it to a tax "on a greater portion of its business than is reasonably attributable to this state," may file with its return a statement of their objections to the tax and their own alternative method, which the commissioner then passes upon; and if the method "is in fact inapplicable, and inequitable," he is to redetermine the tax base by such other method of allocation "as shall seem best calculated to assign to the state for taxation the portion of the business reasonably attributable to the state." All this is, of course, subject to the general appeal to the state superior court accorded by § 435c to "any taxpayer aggrieved," with the court empowered to grant "such relief as may be equitable," including an order for the refund of any tax paid with interest.

The district court, relying on certain precedents hereinafter discussed, held that if this tax applied to a wholly interstate business it would be an undue burden thereon, contrary to Art. 1, § 8, of the United States Constitution, and hence indulged in the presumption of validity to interpret the statute as applicable only to those corporations [fol. 136] which carried on an intrastate business. This we think is to warp the meaning beyond permissible limits. The broad sweep of the language imposing the tax and the subordinate provisions for careful allocation of the tax between business within and without the state seem to us to disclose unmistakably an intent to make the tax applicable in a case such as this. Indeed, the commission which recommended the tax envisaged its application to interstate business and carefully discussed its validity in the light of that premise. Rep., Connecticut Temporary Commission to Study the Tax Laws, 1934, 455, 456, 483; and *cf. Stanley Works* v. *Hackett*, 122 Conn. 547, 190 A. 743. It seems to us fairer to hold, as we do, that the statute was intended to apply to the allocated local business of corporations situated as was the plaintiff and then to face directly

the main issue whether the tax is in fact an unconstitutional burden on interstate commerce.

The traditional dogma is that a state cannot tax interstate commerce, the business which constitutes such commerce, or the privilege of engaging in it. *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 55 S. Ct. 477, 79 L. Ed. 934; *Matson Nav. Co.* v. *State Board* 297 U. S. 441, 56 S. Ct. 553, 80 L. Ed. 791; *New Jersey Bell Telephone Co.* v. *State Board of Taxes*, 280 U. S. 338, 50 S. Ct. 111, 74 L. Ed. 463. And the fact that some of the business is intrastate justifies a tax only on that part and not upon either the interstate business or the whole business without discrimination. *Cooney* v. *Mountain States Telephone & Telegraph Co., supra.* In the past years, however, many exceptions have served increasingly to limit this strict rule. As was said in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944: "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it [fol. 137] increases the cost of doing business. 'Even interstate business must pay its way,' *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 259, 39 S. Ct. 265, 63 L. Ed. 590."

Hence we now find that the person who conducts an interstate business is subject to a property tax on the instruments employed in the commerce, *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 8 S. Ct. 961, 31 L. Ed. 790; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171, 17 S. Ct. 527, 41 L. Ed. 960; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 25 S. Ct. 686, 49 L. Ed. 1059, and if the instruments are used both within and without the state, a fairly apportioned tax is permitted. *Pullman's Palace-Car Co.* v. *Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 38 S. Ct. 373, 62 L. Ed. 827. And a domestic corporation is taxable on its earnings from interstate as well as intrastate commerce. *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918 E 748; *Atlantic Coast Line R. Co.* v. *Doughton*, 262 U. S. 413, 420, 422, 43 S. Ct. 620, 67 L. Ed. 1051; *Matson Nav. Co.* v. *State Board, supra.* Again, the assets of a foreign corporation engaged in interstate commerce have been held

taxable not only by the state in which they have acquired a business situs, *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061, 113 A. L. R. 228, but also by the state in which the corporation has a commercial domicile. *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143. Finally, a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271, 45 S. Ct. 82, 69 L. Ed. 282; *cf. Hans Rees'* [fol. 138] *Sons* v. *North Carolina*, 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879; *Butler Bros.* v. *McColgan*, 315 U. S. 501, 62 S. Ct. 701, 86 L. Ed. 991. Even a tax measured by gross receipts fairly apportioned to the local commerce is no longer barred where there is not danger of duplicating taxation by other states or other inequity. *Western Live Stock* v. *Bureau of Revenue, supra; McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876. See the scholarly articles by Professors Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 83-89, and Powell, *New Light on Gross Receipts Taxes*, 53 Harv. L. Rev. 909.

When, however, a corporation is engaged within a state solely in interstate commerce, it must be conceded frankly, and this is the basis of the thoughtful conclusion of the court below, that the Supreme Court to date has held it immune from net income taxation by that state. In 1925, in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916, 44 A. L. R. 1219, the Court, Mr. Justice Brandeis dissenting, held invalid a Massachusetts exercise tax measured in part by net income when applied to a company doing no intrastate business, but having a considerable amount of interstate business within the state, where it maintained a large office and a sales staff. This followed *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (Mr. Justice Brandeis dissenting at some length) and was, in turn, followed in 1933 in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S.

218, 53 S. Ct. 373, 77 L. Ed. 710, where Mr. Justice Cardozo wrote the dissent for himself and Justices Brandeis and Stone. Here the Court rejected the additional argument, stressed in the dissent, that the corporations had qaulified to carry on intrastate business though they had not in fact done so.

If that were the whole story or if further our duty were limited to picking the closest unoverruled analogy in re- [fol. 139] ported cases and following that blindly and mechanically, we should hold that these cases, and particularly the *Alpha Cement* case, had foreclosed all further discussion. But that is far from the whole story; the trends noted above have gone further in several specific cases fundamentally close to this and in divisions in the Court itself, which are certainly not without significance in forecasting the future course of the law. And our function cannot be limited to a mere blind adherence to precedent. We must determine with the best exercise of our mental powers of which we are capable that law which in all probability will be applied to these litigants or to others similarly situated. If this means the discovering and applying of a "new doctrinal trend" in the Court, *Perkins* v. *Endicott Johnson Corp.*, 2 Cir., 128 F. 2d 208, 217-218, affirmed 317 U. S. 501, 63 S. Ct. 339, 87 L. Ed. ——, this is our task to be performed directly and straightforwardly, rather that "artfully" dodged. *The Attitude of Lower Courts to Changing Precedents*, 50 Yale L. J. 1448, 1459. As was said recently with rare prescience by Judge Parker in the controversial issue as to the constitutionality of the required flag salute: "Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties." *Barnette* v. *West Virginia State Board of Education*, D. C. S. D. W. Va., 47 F. Supp. 251, 253, affirmed 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. ——. We must then decide how far we think, at this point of time, the *Alpha Cement* decision controls this case.

In addition to the general course of decisions on state [fol. 140] taxes, we shall examine certain specific trends disclosed by the Court and more directly applicable to the present issue. In so doing we must bear in mind at all times that the emphasis of the present Court in tax problems is on practical considerations. The trend is away from the automatic condemnation of taxes by formal, preconceived, and antiquated rules. As was said in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 445, 61 S. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229: "We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

First, we should note the now established and undenied power of a state to impose a registration or license fee on those using motor vehicles in the state, although engaged in interstate commerce, or to impose a reasonable charge for the use of its highways by motor vehicles so employed. *Hendrick* v. *Maryland*, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385; *Kane* v. *New Jersey*, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222; *Clark* v. *Poor*, 274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551. The Connecticut tax involved in the last case of one cent per each mile travelled within the state by an interstate carrier was sharply attacked for discrimination, as local corporations paid no such tax, being liable instead for an excise tax on their gross receipts and a general state income tax. The Court held, however, that these two sets of taxes were complementary and that there was no discrimination.

If a highway tax based on the difficult and uncertain formula of mileage within the state is to be sustained, it is clear that similar taxes, based on other formulas which are less arbitrary than that of mileage, must be equally valid. The formula used in the case at bar, for example, [fol. 141] would be a fairer means of measuring the tax owed by a foreign corporation. It would seem, therefore, that constitutionality would be ensured for the present tax as applied to interstate trucking if the legislature clearly showed that it was intended to provide funds for the benefit and upkeep of the highways. Realizing this, it would be myopic of us to ignore practicality and demand that

the legislature actually make this verbalization, without meaning to the taxpayer, to validate the measure. Of course, the Connecticut legislature could easily and properly make the statement, for it appears that in normal times from 33 to 47 per cent of the state's revenues went into the highway fund. Rep., Connecticut Temporary Commission to Study the Tax Laws, 1934, 29-56; Rep., Connecticut Commission Concerning the Reorganization of the State Departments, 1937, 149, 150. Hence, even as the tax now stands, we can expect one-third to nearly one-half the receipts to be used for the highways.

Next, we note that the present attitude of the Supreme Court to interfere only most reluctantly with a legislative scheme for apportioning income to business within and without the state, *Butler Bros.* v. *McColgan, supra,* leaves the distinction between a permissible and an assertedly unpermissible allocation under the *Alpha Cement* case a barren one, indeed. In the *Butler Bros.* case it refused to accept detailed accounting expositions showing that the allocation fraction erred by including actual interstate income in the intrastate income figure. It virtually discarded the *Hans Rees'* decision, *supra,* in which a fraction was overturned, and made a definite statement that in the future only fractions which were clearly arbitrary would be reviewed.

In practical result, therefore, the Supreme Court does now tacitly sanction the taxation of the net income from interstate commerce of a foreign corporation which does both intrastate and interstate business. A state, under the [fol. 142] pretense of taxing income of a corporation from intrastate business, can apply a fraction to total income in order to determine intrastate income; and the result achieved is taxable, whether actual interstate income is included or not, as long as the fraction is not openly arbitrary. In *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331, 60 S. Ct. 273, 84 L. Ed. 304, Texas levied a franchise tax on the Ford Company, which was engaged in both intrastate and interstate business. The tax was allegedly based on the proportion of capital assets of the Company located in Texas, and an allocation fraction was used to reach a figure of over twenty-three million dollars. Although the Company showed that the actual value of its Texas assets was only some three millions, the tax was upheld by the Supreme

Court, with only Mr. Justice McReynolds dissenting. The logical conclusion would appear to be that, provided a mere minimum of intrastate business is discovered, a substantial tax may be levied on the interstate income; while if such minimum is not discovered, no tax can be collected no matter how large is the interstate income actually developed within the state—a reductio ad absurdum in a field where we are instructed to be highly practical.

Next we must observe that at least a minority, and possibly more, of the present Court is committed to the view, expressed most forcibly by Mr. Justice Cardozo, dissenting, in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, *supra*, that the tax is properly levied on a concern which has qualified to do intrastate business, even though it is not actually so engaged. This is in line with the consistent view of the Court in construing a tax of this kind to be one upon the privilege of "doing business in a corporate capacity," and not upon the business or activities that were the outcome of the privilege. *Home Ins. Co. of New York* v. *State of New York*, 134 U. S. 594, 10 S. Ct. 593, 33 L. Ed. 1025; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 31 S. Ct. 342, [fol. 143] 55 L. Ed. 389, Ann. Cas. 1912B 1312; *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 52 S. Ct. 512, 76 L. Ed. 1136. This concept is, of course, reinforced by the action of the legislature in 1937 in expressly making the tax one upon not merely the carrying on of business in the state, but also upon "the right to carry on" such business.

The district court made note of this argument, but held it inapplicable because plaintiff was not fully authorized to do business within the state unless and until it had the certificate of public convenience of the Connecticut Public Utilities Commission for the operation of intrastate trucks. But such regulations are of a police nature, comparable to licensing of motor vehicles, and can hardly be considered as affecting the fundamental franchises of the state to carry on a local business, which is the privilege upon which the tax is levied. A corporation when it becomes a local entity must, of course, submit, like all others, to numerous and increasing regulations for the public welfare; and its duty to pay taxes, once it is properly within the state, should not be made to depend upon its compliance with all such regulations.

Finally, and perhaps most important of all, are the broad trends in favor of the state-taxing power shown of late by the present Court. Perhaps most important is the announcement of the view, following that of Justice Brandeis dissenting in the three controversial cases upon which this judgment particularly rests, that it is the duty of Congress, not of the courts, to protect interstate commerce against the evils of unfair state taxation. This view has been most cogently expressed by Mr. Justice Black in persuasive dissents in *Gwin, White & Prince* v. *Henneford, supra,* and *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 316, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429. Thus, in the *Gwin* case, *supra,* 305 U. S. at page 455, he said: "I would return to the rule that—except for state acts designed to impose [fol. 144] discriminatory burdens on interstate commerce because it *is* interstate—Congress alone must 'determine how far [interstate commerce] * * * shall be free and untrammeled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.' *Welton* v. *Missouri,* 91 U. S. 275, 280, 23 L. Ed. 347." By 1940, Mr. Justice Black had been joined by Justices Douglas and Frankfurter in dissent in *McCarroll* v. *Dixie Greyhound Lines,* 309 U. S. 176, 189, 60 S. Ct. 504, 84 L. Ed. 683, where they said: "Unconfined by 'the narrow scope of judicial proceedings' Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union."

There can be no question that this view so compellingly expressed will have increasing weight in the deliberations of the Court and, even if it is not accepted by the majority in full, will tend to prevent the invalidating of taxes on formal grounds. We have already pointed out the increasingly favorable attitude of the Court towards gross receipts taxes. A commentator, cited *supra,* who considers the present Court to stand four to three against the proposition of judicial lack of power in the premises, with two justices not yet recorded, goes on to say that these circumstances "seem to foreclose any probability that taxes on gross receipts from interstate transportation and com-

munication will be condemned on formal grounds, if otherwise unobjectionable," and that "the Court will probably sustain such a tax if it does not threaten interstate commerce with a heavier burden than local commerce, or in some other manner threaten an unfair or unreasonable burden on interstate commerce." Lockhart, 57 Harv. L. Rev. at 95. [fol. 145] It is perhaps these developments within the Court which led Mr. Chief Justice Stone, speaking for a unanimous court, to say, by way of dictum, it is true, but nevertheless apparently advisedly: "In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, *cf. Wheeling Steel Corp.* v. *Fox, supra* [298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143], or upon net income derived from within the state, *Shaffer* v. *Carter*, 252 U. S. 37, 57, 40 S. Ct. 221, 64 L. Ed. 445; *Wisconsin* v. *Minnesota Mining Co.*, 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274; *cf. New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 666, 108 A. L. R. 721, is not prohibited by the commerce clause on which alone taxpayer relies." *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 656, 62 S. Ct. 857, 86 L. Ed. 1090. The broad sweep of this language is noteworthy. It is not limited to a tax at the commercial domicile. (Defendant has claimed that plaintiff has a commercial domicile within the state, but we agree that its commercial domicile is in Chicago.) On the contrary, there is the flat statement that even if the taxpayer's business is *wholly* interstate commerce a nondiscriminatory tax by a state upon net income derived from within the state is not prohibited by the constitutional provision.

Here this tax certainly cannot be considered discriminatory. It is levied on all corporations carrying on business within the state, local corporations paying at the same rate as foreign ones, and with most careful provisions for the ascertainment of only income produced within the state. Indeed, if we should strike down the tax against plaintiff, we would be discriminating against intrastate business, which would still have its burdens to pay under the tax and which is just as much entitled to constitutional protection from discrimination as interstate commerce, as the dissents [fol. 146] of Mr. Justice Brandeis and Mr. Justice Black, cited above, in particular have pointed out. As a matter of

fact, such an action by us would mean that a corporation which does a vast business within the state will escape completely from contributing to the expenses of the state. There will also be offered to large interstate commerce corporations the possibility of escaping state income taxation, since the main office and the domicile of the corporation can be set up in a state with no such taxes, and the business can be kept strictly interstate. The record in this case shows how skillfully the plaintiff is avoiding heavy taxation not merely by its choice of domicile, but even by the location of its affiliate, the owner of its trucks, in a state, Illinois, where licensing fees are favorable and reciprocity is had with other states. This business, of course, competes with the interstate railroads. Its comparative immunity from taxation seems neither equitable nor desirable —at least until and unless Congress so determines.

It is objected that if Connecticut can levy this tax then all states through which plaintiff's trucks operate can levy a somewhat similar tax, and plaintiff will be burdened by the iniquity of multiple taxation. There seem two ready answers to this suggestion. The first is that the record does not suggest that other states are making such levies, and it will be time enough to consider the problem of multiple taxation when and if it arises. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 587, 57 S. Ct. 524, 81 L. Ed. 814. The second is that if in fact other states can show as rational a basis for taxation on this business as is here shown there seems no reason why plaintiff, like its competitor railroads, should not pay the taxes so properly assessed. Mr. Justice Black has well expressed this idea in his dissent in *Gwin, White & Prince* v. *Henneford, supra*, 305 U. S. at page 448: "A business engaging in activities in two or more States should bear its part of the tax burdens [fol. 147] of each. If valid, non-discriminatory taxes imposed in these States create 'multiple' burdens, such 'burdens' result from the political subdivisions created by our form of government. They are the price paid for governmental protection and maintenance in all States where the taxpayer does business. A State's taxes are not discriminatory if the State treats those engaged in inter-state and intra-state business with equality and justice."

We conclude, therefore, that the levy upon plaintiff is only of a nondiscriminatory tax upon income fairly at-

tributable to interstate business in this state and that as such it is not prohibited under the commerce clause of the United States Constitution. Plaintiff also urges that the tax is invalid as violating both federal and state due process. We need add nothing to what we have already said save to notice a particular objection of improper delegation of legislative power to the commissioner. While this is urged on both federal and state grounds, it is said that the state rule is especially strict. *State* v. *Stoddard*, 126 Conn. 623, 13 A. 2d 586; *Connecticut Baptist Convention* v. *McCarthy*, 128 Conn. 701, 25 A. 2d 656. But the Connecticut court relies strongly and almost exclusively on decisions of the Supreme Court of the United States, and we do not believe it intends to adopt a peculiar local rule. Plaintiff's objection is directed particularly to the power accorded the commissioner under §420c of allocating income within and without the state and rests upon the contention that plaintiff's income is not derived from the use of tangible personal property and hence that the allocation is made not by employment of the allocation fraction set forth in the statute, but by the alternative method, that is, "under rules and regulations of the tax commissioner." The latter is urged as the unconstitutionally broad power.

We should hesitate in this proceeding to declare even the broader alternative so defective as to make the tax uncon- [fol. 148] stitutional. We have seen how unwilling the Supreme Court is to upset a method of allocation unless it is shown improper by "cogent evidence." *Butler Bros.* v. *McColgan, supra.* The method here, even down to the objected to alternative, was worked out by a very able commission in the light of what seems to have been considerable experience elsewhere;[3] and the provisions particularly ob-

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[3] The Temporary Tax Commission, consisting of seven distinguished citizens of the state appointed by the Governor pursuant to Special Act No. 474 of 1933, under the chairmanship of Fred R. Fairchild, Professor of Taxation at Yale University, and with a skilled research staff, reported that this was the Massachusetts plan of allocation in use in five states and similar to the plans of six other states and found to be the most satisfactory by a Committee of the National Tax Association after a decade of study. Rep. 1934, 458-460.

jected to are additions, made after the general principle has first been stated, which together with the further relief and appeal sections, constitute an unusual and significant attempt to avoid unfairness or injustice in special cases. But the commissioner has found the more explicit alternative to be applicable, and we are not disposed to quarrel with that administrative determination. Where "use of tangible personal property" ends and personal service begins may be often difficult to decide; at least it seems not unreasonable to conclude that a trucking business requires preëminently the use of trucks. The fact that for another purpose the Connecticut court has held "service" to be "the predominant feature" of the furnishing of food in a restaurant, *Lynch* v. *Hotel Bond Co.*, 117 Conn. 128, 131, 167 A. 99, does not particularly help us here. As a matter of fact, the method here employed appears to have produced a result anything but harsh in the light of the large amount of plaintiff's business which originates in this state.[6] We think this objection [fol. 149] not well taken. *Cf. Smolowe* v. *Delendo Corp.*, 2 Cir., 136 F. 2d 231, 240, certiorari denied 64 S. Ct. 56; *Stanley Works* v. *Hackett*, *supra*.

A final objection to the levy is that the commissioner, in adding to plaintiff's federal net income "interest and rent paid" during the year, as provided in §419c, included as part of the tax base here 40 per cent of the amount which plaintiff paid to its affiliate, Wallace Transport Co., for lease of the latter's trucks. The purpose of this statutory provision was carefully explained by the Commission—that a business tax should not depend upon the financial organization of a corporation, but upon the amount of the business done, and net income should include "payments and accruals to the credit of all contributors of capital—that is, rental and interest payments and accruals as well as net profits available for stockholders," thus, of course, avoiding tax evasion by the mere device of renting, instead of owning, property. Rep., Connecticut Temporary Commission to Study the Tax Laws, 1934, 471; cf. *W. T. Grant Co.* v. *McLaughlin*, 129 Conn. 663, 30 A. 2d 921, and *House of Hesselbach, Inc.* v. *McLaughlin*, 127 Conn. 507, 18 A. 2d 367. And this inclusion in the tax base was sanctioned by the case cited and

[6] See note 4, *supra*, which demonstrates how the ratio based on receipts is sharply reduced by the other two ratios.

relied on by the Commission, *Atlantic Coast Line R. Co.* v. *Doughton*, 262 U. S. 413, 422, 43 S. Ct. 620, 67 L. Ed. 1051. Its general fairness is obvious; plaintiff by causing Wallace to be incorporated for the ownership of the interstate trucks here involved should not thereby obtain an unusual tax advantage over concerns whose business is not thus divided.

When the commissioner first came to apply this provision to the "purchased transportation," he felt, and was so advised by the State Attorney-General, that he should deduct from truck rentals the expenses assignable to salaries and wages, gasoline, oil, and other related expenses created by the operation of the trucks. In view of the number of taxpayers involved, he decided to establish a general ratio, [fol. 150] rather than seek for one in each particular case, and, after taking evidence from various trucking concerns, established a mean among the amounts shown of 40 per cent. The District Court has found that, while this is a fair deduction as applied to the companies examined, their operations are not fairly comparable to those of plaintiff. This was based upon some evidence introduced by plaintiff of certain differences in the operations in question, as, for example, the length of the hauls involved, and perhaps more particularly of a balance sheet of the Wallace Company showing a net loss on its operations. But we think this does not help the plaintiff to demonstrate an unconstitutional tax exaction. It appears to be assumed, though not specifically found, that the same persons who own plaintiff also own Wallace; but there is no reason shown why the separate entities should be disregarded and Wallace's losses attributed to plaintiff or how this fact shows a greater expense to be attributed to truck operation than the commissioner has found to be normal. Here, indeed, there is some reason to suppose that the expenses should be less, for plaintiff, apparently unlike the companies studied, puts its own drivers on the trucks and pays their salaries. On the face of it, the entire payment was for the lease of equipment, and it would seem that the commissioner might prima facie have disallowed the deduction in full (as he does by adding to it federal net income as provided by the statute) until and unless the plaintiff has shown its inequity. Certainly that should be true, at least in a proceeding questioning the validity of the tax, where the commissioner has gone farther and made an allowance deduced from general experience and fair, perhaps more

than fair, on its face as to the taxpayer concerned. We must remember that for all specific inequities in a particular levy, the taxpayer has his full remedy under the statute, first to the commissioner and then to the courts of the state, to secure a reduction or an elimination of the tax.

[fol. 151] *Jurisdiction of the Federal Court.* In its opinion the district court said, 47 F. Supp. at page 674: "It is agreed that no plain, speedy and efficient remedy may be had in the state courts either by appeal, *Lathrop* v. *Norwich*, 1930, 111 Conn. 616, 151 A. 183, or by injunction, *Waterbury Savings Bank* v. *Lawler*, 1878, 46 Conn. 243." It also made extensive findings of fact and conclusions of law to support this holding. These followed plaintiff's complaint, which contained not only usual jurisdictional allegations covering its constitutional claims, the diverse citizenship of the parties, the amount in controversy, and the applicability of 28 U. S. C. A. §400, authorizing declaratory judgments, but also special allegations as to Connecticut rules of law—hereinafter discussed—to the effect that a taxpayer cannot appeal from a tax assessment by the method provided in the statute and at the same time claim the statute to be unconstitutional, that the remedy of injunction is precluded, that the commissioner threatens penalties and liens against plaintiff and its business, and that plaintiff has no plain, speedy, and efficient remedy in the state courts and is threatened with "irreparable harm." All of these allegations of the complaint the defendant expressly admitted in his answer, denying only other allegations having to do directly with the asserted invalidity of the tax. And before us, defendant, while not alluding to the court's jurisdiction, pressed strongly for an adjudication of the validity of the tax.

Notwithstanding this concurrence of view and desire of the parties for a complete adjudication, it is our duty to make an independent reëxamination of the question. The Act of August 21, 1937, 50 Stat. 738, amending Jud. Code §24, 28 U. S. C. A. §41(1), to deny "jurisdiction" to a district court "of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and [fol. 152] efficient remedy may be had at law or in equity in the courts of such State," is in the public interest "to avoid needless obstruction of the domestic policy of the states."

Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293, 298, 63 S. Ct. 1070, 87 L. Ed. ——; cf. also *Bender* v. *Connor*, D. C. Conn., 28 F. Supp. 903. Following this clear mandate, we have considered the matter at length and conclude that jurisdiction is to be upheld on either one of two grounds which, as applied to this case, complement each other. One is that our conclusion, which, as the *Huffman* case points out, 319 U. S. at page 295, is in effect a declaratory judgment in favor of constitutionality, is, we think, within the discretionary power of the federal courts under the limitations set by that case. The other is that, while we are not prepared to assert dogmatically that no remedy is available in the state courts, we are convinced that, if existing, it is anything but "plain." As in *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 110, 59 S. Ct. 715, 83 L. Ed. 1134, "At any rate, without an authoritative determination by the state courts, we cannot say, for this character of proceeding, that the remedy in the state courts is plain, speedy and efficient." See, also, *Mountain States Power Co.* v. *Public Service Commission of Montana*, 299 U. S. 167, 170, 57 S. Ct. 168, 81 L. Ed. 99, where the remedy depended upon "the problematical outcome of future consideration," and *Corporation Commission of Oklahoma* v. *Cary*, 296 U. S. 452, 458, 56 S. Ct. 300, 80 L. Ed. 324, where the opposed decisions of the state court had caused "serious uncertainty."

In the *Huffman* case the Court did not decide whether the statutory prohibition against tax injunctions applied also to declaratory judgments, but held that the previously existing discretionary power in the federal courts as to award of relief to a taxpayer applied to require dismissal of an action for such a judgment, without decision on the merits, when state law, with the right to appeal to the Court, afforded [fol. 153] adequate protection to the taxpayer. The Court stressed, 319 U. S. at page 298, that "interference with state internal economy and administration" was at the base of this restraint in granting relief. Where that reason is lacking, it would seem proper to a federal court to act, in the absence of a definite prohibition by Congress; indeed, the Court has held that even a definite prohibition against suits to restrain collection of federal taxes, now 26 U. S. C. A. §3653, may be waived by "earnest request" of the Government that the Court pass upon the validity of the tax law. *Helvering* v. *Davis*, 301 U. S. 619, 639, 57 S. Ct. 904, 81 L. Ed.

1307, 109 A. L. R. 1319. Here the state officials charged with the assessment of the tax are seeking a definitive adjudication; and they do so in the light of grave uncertainty—as we shall see—as to what other course will protect them speedily and efficiently in the discharge of their statutory duties. Here, in so far as it may be a matter of discretion, we hold it clear that state internal economy and administration will be promoted, rather than retarded, by adjudication on the merits.

Turning now to the plainness of the remedy available in the state courts, we find a considerable and definite line of authorities, applied in tax proceedings as well as generally, holding that one who accepts the remedy of appeal provided by a statute has thereby agreed to its validity and cannot at the same time challenge its legality. In addition to the *Lawler* case cited by the district court are *Holley* v. *Sunderland*, 110 Conn. 80, 86, 147 A. 300, 302; *Young* v. *West Hartford*, 111 Conn. 27, 149 A. 205, 207; *Coombs* v. *Larson*, 112 Conn. 236, 246, 152 A. 297; *Chudnov* v. *Board of Appeals*, 113 Conn. 49, 51, 154 A. 161, 164; and *National Transp. Co.* v. *Toquet*, 123 Conn. 468, 196 A. 344, 348. The rule has also been applied in a case where the state officials themselves sued to collect a tax. *Spencer, State Treasurer* v. *Consumers' Oil Co.*, 115 Conn. 554, 559, 162 A. 23. It appears [fol. 154] not to prevent an action for a declaratory judgment, *National Transp. Co.* v. *Toquet, supra*, although this alone is hardly an effective remedy in view of the drastic penalties provided by the statute for the nonpayment of the tax. On the other hand, in a still later case, *Connecticut Baptist Convention* v. *McCarthy*, 128 Conn. 701, 25 A. 2d 656, the court held unconstitutional the very act which it had declined to review in *Holley* v. *Sunderland, supra*, citing the *Holley* case without comment, and with no suggestion of its overruling this line of authorities.

In a case arising before any of the cases cited, *Underwood Typewriter Co.* v. *Chamberlain*, 92 Conn. 199, 102 A. 600, the court had held provisions for appeal to the superior court in a 1915 tax statute there under consideration sufficiently separable to allow a testing of the validity of its application to the appellant after the latter had paid the tax under protest. The appeal provisions there were similar to those provided in many instances both as to town and

state taxes, and not greatly different from the provisions of the 1935 statute, § 435c, which, as we have seen above, authorizes the court to order a refunding of the tax. It is true, however, that the appeal provisions of the 1915 statute, now to be found in Conn. Gen. Stat. 1930, § 1335, were more general and inclusive than those we are now considering; they, together with provisions for statements, corporate returns, and tax assessments, were part of a comprehensive corporation tax statute of thirty-two sections, covering such diverse cases as railroad and street railway companies, water, gas, electric power, and other public utility companies, stock insurance companies, and miscellaneous corporations. See, inter alia, Gen. Stat. 1930, §§ 1087, 1097, 1107-1123, 1274, 1302-1337. On the other hand, § 435c of the 1935 statute is a limited and a closely integrated part of the one single type of tax there provided. In *Torrington Co.* v. *Hackett*, 124 Conn. 403, 200 A. 338, [fol. 155] 340, it was given a restrictive interpretation and held unavailing to correct an error in a corporate return, disclosed only by a court decision interpreting the act favorably to the taxpayer and rendered after the statutory time for appeal of one month had expired. Under the circumstances and in the light of these various state decisions we cannot say that the statutory appeal is available for the plaintiff's contention here.

Turning now to the availability of the injunctive process, the Connecticut court has refused it in the *Lawler* case, *supra*, cited by the district court, and in other cases involving town taxes, including *Wilcox* v. *Town of Madison*, 106 Conn. 223, 137 A. 742, which appears to be the last authoritative statement of the rule. The court there said that it had refused to adopt the rule resting jurisdiction "solely upon the illegality or invalidity of the tax," but instead had required a showing of threat of irreparable injury and lack of adequate remedy at law. It cited several cases where the remedy had been refused, and stated that it was aware of only two cases where it had been granted, *Seeley* v. *Town of Westport*, 47 Conn. 294, 36 Am. Rep. 70, a "flagrant case" of a tax against neither "the proper person nor the proper estate," and hence without the general rule, and *New London* v. *Perkins*, 87 Conn. 229, 87 A. 724, where a city, legally exempt from taxation and required to operate a ferry, was allowed to enjoin the tax collector of a neighbor-

ing town from selling for taxes land used for the ferry's public landing. Even the possibility of appeal under the statute might be held to preclude an injunction here. Moreover, precedents in actions against towns are not helpful in view of the state's immunity from suit. No action of any kind against state taxing officials has been found, although the *Underwood* case, *supra*, does suggest that the statutory appeal should apply to make an injunction unnecessary. Against whom it should be directed is not stated. In any event, therefore, the plaintiff's right to an injunction is far from plain.

[fol. 156] The state's immunity from suit also makes inapplicable another line of cases holding that a town tax paid under protest is under duress, so that a suit will lie against the town for its refund. *Shaw* v. *City of Hartford*, 56 Conn. 351, 15 A. 742; *H. E. Verran Co.* v. *Town of Stamford*, 108 Conn. 47, 49, 142 A. 578; *Pitt* v. *City of Stamford*, 117 Conn. 388, 167 A. 919. It seems at least doubtful whether any state official can be found who would be personally liable for a refund of the tax. In the very early case of *Thames Mfg. Co.* v. *Lathrop*, 7 Conn. 550, town selectmen were held liable in trespass for a seizure of property for a tax invalid because of their failure to perform a ministerial act. This case was distinguished and limited in *Phelps* v. *Thurston*, 47 Conn. 477, where liability was denied and the court said, at page 486, that the plaintiff might have paid his tax and "an action of assumpsit against the town would have been a plain and effective remedy." No other case applying this principle even against town taxing officials has been discovered. In *Hubbard* v. *Brainard*, 35 Conn. 563, 576, decided by a divided court and reversed on another ground in 12 Wall. 1, 79 U. S. 1, 20 L. Ed. 272, recovery under the first federal income tax law was allowed against the collector of internal revenue, which, of course, is only the modern federal rule, as we discussed in *Hammond & Knowlton* v. *United States*, 2 Cir., 121 F. 2d 192, 194, 195, certiorari denied 314 U. S. 694, 62 S. Ct. 410, 86 L. Ed. 555.

If personal liability were to be spelled out here, it would be difficult to decide upon whom the burden should rest. While the tax commissioner computes the tax, the 935 statute provided in § 431c that the tax should be paid to the commissioner "in cash or by check, draft or money-order

drawn to the order of the state treasurer,"[7] and in § 432c, [fol. 157] entitled, "Settlement with treasurer," that "All funds received by the tax commissioner under the provisions of this chapter shall be recorded with the comptroller and shall be deposited daily with the state treasurer." Here are three participating state elective officials; in addition the secretary of state is to institute proceedings for the forfeiture of the charter of corporations failing to file a return, § 428c, the attorney general may sue for the tax or to foreclose a tax lien, and various deputies, marshals, county sheriffs, deputy sheriffs, and town constables have duties as to the seizure of property or other methods of collection of the tax, §§ 433c and 357c and Supp. 1939, § 305e. Finally, since the responsibility of the state is not pledged for the action of any of these officials and no claim for their acts can be had except by special legislative act, Gen. Stat. 1930, § 83, it is questionable whether their personal responsibility should be considered adequate for the taxpayer's protection.

Of course, we recognize that the Connecticut Supreme Court of Errors is not at all foreclosed by these decisions from finding some remedy available or, indeed, clear. That is its undoubted province. Ours is decidedly more limited. We are bound to accept state law as we find it, and can hardly justify exposition which adds by assuming only to clarify. Since we do not find a definitive state determination, we must conclude that the state remedy depends upon "the problematical outcome of future consideration," and hence that jurisdiction exists for our judgment herein. Judgment reversed for the entry of a judgment for defendant on the merits.

DISSENTING OPINION

L. HAND (dissenting):

Section 418(c) of the Connecticut "Corporation Business Tax Act of 1935" imposes an excise upon the "franchise for the privilege of carrying on or doing business within the

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[7] For reasons not apparent, the legislature in 1943, after the decision below, amended this statute to provide that such checks should thereafter be made payable "to the order of the tax commissioner." Conn. Gen. Stat., Supp. 1943, §298g.

[fol. 158] state." The plaintiff has asked no leave of the state to do its business, and needs none; nor has it a "commercial domicile" within the state which would draw upon itself the state's taxing powers. Moreover, some parts of the statute are clearly inapplicable to it: *e. g.* § 248(c) which forfeits the corporation's "corporate rights and powers" after a delinquency of two years, and even terminates "its existence as a corporation." Thus, we have before us in the barest possible form the effort of a state to levy an excise directly upon the privilege of carrying on an activity which is neither derived from the state, nor within its power to forbid. Concededly there is an unbroken line of decisions holding such a tax invalid; and in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, even the dissenting justices were careful to declare that the result might have been different if the corporation "had not sought for and obtained a privilege or franchise to do a local business in the state" (p. 229). Moreover, the latest decision of the Supreme Court (*Mayo* v. *United States*, 319 U. S. 441) upset an excise, imposed directly upon an activity of the United States, by distinguishing situations in which the tax was upon an agent of the government (*Graves* v. *New York, ex rel. O'Keefe*, 306 U. S. 466), or upon property necessary to the activity (*Alabama* v. *Boozer & King*, 314 U. S. 1), or in which a state statute regulated an agency which supplied the activity. (*Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania*, 318 U. S. 261.) One ground at any rate for that distinction is that the state's action may, or may not, impose a burden upon the federal activity, for no one can say what will be the final incidence of the charge; reasoning which has also been used to validate a tax which only "indirectly" burdens interstate commerce.

It seems to me clear that we are therefore not yet justified in supposing that the distinction between an excise upon a federal activity, and an excise upon some contributing activity has ceased to exist. If I were free to start afresh, [fol. 159] I should not myself make that distinction; it is derived, I believe, either from the actual decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, or from the gloss that later cases have put upon it, depending on how seriously one takes certain parts of the opinion. I think it a barren way to treat the distribution of power in a federation like ours to say that, if a state can tax a national activity, it follows that it must have the power to cripple or frustrate it. If I

could, I should hold that, while Congress had a paramount power to prevent just that—or while in plain cases possibly the courts might themselves intervene—in ordinary situations the states were free to tax all activities within their borders provided they did so equitably. The prevalent doctrine may perhaps be accounted for because in the early days of the Republic it was natural—possibly it was necessary—to set absolute boundaries in the distribution of political power. National sentiment was weak, Congress was not disposed to a strong assertion of federal powers; and it always gives an appearance of greater authority to a conclusion to deduce it dialetically from conceded premises than to confess that it involves the appraisal of conflicting interests, which are necessarily incommensurable. All that is now past; and the Supreme Court may eventually hold that Congress alone can say when such a tax is "reasonable": conceivably, as I have suggested, it may in extreme cases undertake that duty itself. But it seems to me clear that, whatever the future may hold, it has not done so yet; but that, on the contrary, it still adheres to the old distinction.

I do not forget that the tax at bar is not levied upon an activity of the government, like the tax involved in *Mayo* v. *United States, supra* (319 U. S. 441). Maybe there is a distinction between a governmental activity and an activity of individuals, like interstate commerce, though both are equally protected by the Constitution; it is certainly true that, as to regulation of interstate commerce, the notion of the paramountcy of Congress has already gained great [fol. 160] headway. However, I can find no such incursion into the field of taxation, except in dissents; and while the doctrine I should like to see prevail may make its first advance in the "direct" taxation of interstate commerce, there appears to me to be great difficulty in finding an excuse for such a beginning that does not swallow the whole doctrine. Up to the present, so far as I can see, the immunity of interstate commerce from such taxation as such has rested upon the same considerations which still prevail as to the immunity of an activity of the United States. Moreover, the arguments which have been at times put forward —mistakenly in my opinion—to justify the second, apply equally to the first: I mean that all federal powers were expressly granted by the states, and that they have a repre-

sentation in Congress which the nation has not in their legislatures.

It is always embarrassing for a lower court to say whether the time has come to disregard decisions of a higher court, not yet explicitly overruled, because they parallel others in which the higher court has expressed a contrary view. I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not choose to appeal. In either event the actual decision will be one which the judges do not believe to be that which the higher court would make. But nothing has yet appeared which satisfies me that the case at bar is of that kind; and, as I have said, I can see no good reason for making any distinction between one kind of federal activity and another. The way out is in quite another direction, and includes both. Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth in distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it.

[fol. 161] In United States Circuit Court of Appeals, Second Circuit

* * * * * * *

Spector Motor Service, Inc., Plaintiff-Appellee,

v.

Charles J. McLaughlin, Tax Commissioner, Walter W. Walsh, Substituted Defendant, Defendant-Appellant

Judgment—Filed January 20, 1944

Appeal from the District Court of the United States for the District of Connecticut

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District

Court be and it hereby is reversed with costs for the entry of a judgment for the defendant on the merits.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 162] [File endorsement omitted.]

[fol. 163] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 164] SUPREME COURT OF THE UNITED STATES

* * * * * * *

ORDER ALLOWING CERTIORARI—Filed May 22, 1944.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mandate of Supreme Court of the United States.

(Seal of the Supreme Court
of the United States)

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the District Court of the United States for District of Connecticut,

GREETING:

WHEREAS, lately in the United States Circuit Court of Appeals for the Second Circuit, in a cause between Charles J. McLaughlin, Tax Commissioner, Walter W. Walsh, Substituted Defendant, Appellant, and Spector Motor Service, Inc., Appellee, No. 34, October Term, 1943, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 20th day of January, A. D. 1944, is in the following words, viz:

> "This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut, and was argued by counsel.
>
> On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs for the entry of a judgment for the defendant on the merits.
>
> It is further ordered that a Mandate issue to the said District Court in accordance with this decree."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States

by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-four, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, vacated without costs to either party in this Court.

And it is further ordered, That this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Connecticut with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with the opinion of this Court.

December 4, 1944.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Harlan F. Stone, Chief Justice of the United States, the seventh day of January, in the year of our Lord one thousand nine hundred and forty-five.

CHARLES ELMORE CROPLEY
Clerk of the Supreme Court of the United States

Opinion of Supreme Court of Errors of the State of Connecticut.

Spector Motor Service, Inc. v. Walter W. Walsh, Tax Commissioner

Hartford County; May Term, 1948

ACTION for a declaratory judgment as to whether or not the assessments made against the plaintiff under the Corporation Business Tax Act of 1935 were illegal and void, brought to the Superior Court in Hartford County and tried by the court, *Comley, J.*; judgment determining the issues and appeal by the defendant. *Error in part and case remanded with direction.*

Frank J. DiSesa, assistant attorney general, with whom, on the brief, was *William L. Hadden*, attorney general, for the appellant (defendant).

Cyril Coleman, for the appellee (plaintiff).

MALTBIE, *C. J.* This action presents questions as to the validity and construction of the Corporation Business Tax Act of 1935, Cum. Sup. 1935, Chap. 66b, § 416c et seq., as amended, with reference to a corporation engaged in interstate motor freight service. The action sought a declaratory judgment, and the trial court held that the plaintiff was within the terms of the act, that the act did not as applied to it violate the constitution of this state and that the assessments were not illegal because computed on an improper basis, but that the act as applied to the plaintiff was unconstitutional under the constitution of the United States. The defendant has appealed.

The controversy between the parties has been the subject of protracted litigation in the federal courts. The plaintiff brought an action in the United States District

Court for the District of Connecticut in which it asked a judgment declaring that the act as applied to it was unconstitutional under both the federal and our own constitutions, that the computations by which the amount of the tax was determined by the defendant, the state tax commissioner, were not authorized by the applicable statutes and that they were inaccurate; and the plaintiff also prayed that the commissioner be enjoined from proceeding against it to enforce the tax. The District Court held that the plaintiff was not subject to the tax and directed that an injunction be issued. *Spector Motor Service, Inc.* v. *McLaughlin*, 47 F. Sup. 671. The case was appealed to the Circuit Court of Appeals for the Second Circuit, which, by a divided court, reversed the judgment of the District Court and directed judgment for the defendant. *Spector Motor Service, Inc.* v. *Walsh*, 139 F. 2d 809. The action was then brought by certiorari to the United States Supreme Court, where it was held that until certain questions as to the interpretation and application of the statute were first determined by the courts of Connecticut the issue as to the constitutionality of the act could not properly be decided in the federal courts; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 65 S. Ct. 152, 89 L. Ed. 101; and the rescript in that case was (p. 106): "We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion."

The opinion of the Supreme Court was handed down on December 4, 1944; the action before us, evidently brought to the Superior Court in compliance with that mandate, was begun by writ dated December 21, 1944. Why the trial did not take place until April, 1947, we do

not know. At any rate, we assume that the requirement in the mandate of the United States Supreme Court that proceedings be brought in the courts of this state with reasonable promptness will be found to have been complied with. On that basis, the function we are to perform is limited in its scope. The case brought in the District Court, with its basic issues concerning the constitutionality of the tax as applied to the plaintiff, is still pending there; and it is not for us to trench upon its right to decide those issues. Nor is it for us to quarrel with the decision of the Circuit Court of Appeals, affirmed by the Supreme Court, that our courts are lacking in any means of plain, speedy and efficient remedy for a settlement of the controversy between the parties which, if present, would debar the federal courts from taking jurisdiction. However, we do point out that our declaratory judgment act is broader than those in most, if not all, other jurisdictions; *Connecticut Savings Bank* v. *First National Bank & Trust Co.*, 133 Conn. 403, 409, 51 A. 2d 907; and, in a case where an important constitutional question needed speedy determination, this court decided on April 10, 1947, an action brought to the Superior Court by writ dated March 14, 1947, and reserved to us. *Lyman* v. *Adorno*, 133 Conn. 511, 52 A. 2d 702. Should we determine in an action for a declaratory judgment that the application of the statute to the plaintiff was unconstitutional, the tax commissioner would, of course, accede to that decision; and an injunction to restrain him from any attempt to collect the tax would be supererogatory. Nor are we willing to let pass unnoticed the statement that under our law there is serious doubt whether an injunction such as that sought in the District Court would issue in our courts. We have held that, to the general rule that our courts are reluctant to grant injunctions against the collection of taxes, there is a well-

recognized exception where property against which an assessment is made is exempt by law from taxation; *New London* v. *Perkins*, 87 Conn. 229, 235, 87 A. 724; *Wilcox* v. *Madison*, 106 Conn. 223, 227, 137 A. 742; certainly there is no reason to doubt that our courts would enjoin the collection of a tax found due from a single person where it has been adjudged to be unconstitutional; and this is particularly so where a state tax is involved and, hence, if paid, could not be recovered by an action in the courts. The plaintiff might have secured in the courts of this state the very relief which it sought in the District Court; and we refrain from comment upon the long delay which must ensue before a final settlement of the controversy can be reached, due to its invocation of the jurisdiction of the federal courts.[1]

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[1] We also note that in the opinion of the Circuit Court (p. 820) where it discusses our rule that one cannot appeal under a particular statute and in that appeal attack the constitutionality of the law, the case of *Holley* v. *Sunderland*, 110 Conn. 80, 85, 147 A. 300, is cited as supporting the rule, and it is then said that in the later case of *Connecticut Baptist Convention* v. *McCarthy*, 128 Conn. 701, 25 A. 2d 656, we did on an appeal taken under the same statute consider a claim that the law was unconstitutional. The Circuit Court overlooked the fact that the second case came before us on a reservation in which two definite interrogatories were submitted to us for our advice, as may be done under our practice. Practice Book § 421. Our sole concern was with those specific questions, and the disposition of the case which the trial court might make in the light of our answers was not before us for review. That is why we said in the *Connecticut Baptist Convention* case that, while the question of the constitutionality of the act had been raised in two cases, one of which was the *Holley* case, it had never been so presented that we were called upon to decide it, and why in the *Connecticut Baptist Convention* case we could properly consider it. Moreover, the reason for the rule in the *Holley* case is thus stated in *National Transportation Co.* v. *Toquet*, 123 Conn. 468, 478, 196 A. 344: ". . . as the appeal itself lies only by virtue of the regulation, to hold that regulation void would destroy the basis of the appeal

[Footnote continued on following page.]

As we interpret the decision of the United States Supreme Court, it states three questions which we are to answer: Was it the intention of the General Assembly, as evidenced in the statute, to impose the tax upon persons engaged in interstate commerce in pursuit of the type of business in which the plaintiff was engaged? If so, what aspect of its business was intended to be made the subject of the tax? Finally, upon what basis was it intended that the tax should be computed? *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 104, 65 S. Ct. 152, 89 L. Ed. 101. We assume also that it is proper for us to determine whether the tax violated in any respect the constitution of this state, for the question of the meaning and effect of a state constitution, we understand, is as much a matter for the determination of the courts of the state as is the meaning and effect of one of its statutes; *Glenn* v. *Field Packing Co.*, 290 U. S. 177, 178, 54 S. Ct. 138, 78 L. Ed. 252; and it is also well within our proper function to determine whether the amount of the tax has been properly determined under our statute.

The complaint in this action alleges that the defendant tax commissioner assessed a certain tax against the plaintiff for the years ending May 31, 1936, and May 31, 1937, under the Corporation Business Tax Act of 1935, and also, under an amendment to that act made in 1939, cer-

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[Footnote continued from preceding page.]

itself. . . . The principle is the same as that which denies to a party who bases an action upon the provisions of a particular statute the right to claim in that action that the statute is invalid." See *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411, 37 S. Ct. 609, 61 L. Ed. 1229. We have never held that, where on such an appeal the validity of the statute as a whole is not attacked, but the issue is only whether it applies or properly can apply to the particular appellant, the question may not be determined; and that was precisely what was done in *Slater Mills* v. *Gilpatric*, 97 Conn. 521, 117 A. 806, and in *Underwood Typewriter Co.* v. *Chamberlain*, 94 Conn. 47, 108 A. 154, in appeals under the predecessor of the statute now before us.

tain taxes for the year ending May 31, 1938, the seven months ending December 31, 1938, and the years ending December 31, 1939, and December 31, 1940. The act of 1935 took effect on January 1, 1936; Public Acts, 1935, Chap. 198, § 7; the 1939 amendment took effect upon its passage; Public Acts, 1939, Chap. 134, § 7; that meant when it was signed by the governor; *Old Saybrook* v. *Public Utilities Commission*, 100 Conn. 322, 325, 124 A. 33; and he signed it on May 15, 1939. We regard the allegations of the complaint as a concession that the validity of the first assessment is to be determined under the law as it stood in 1935 and of the others under the law as amended in 1939; nor have the parties claimed otherwise either in the trial court or before us.

The finding of the trial court and the exhibits made a part of it present the following situation: The plaintiff is a Missouri corporation. It originally had its principal place of business in St. Louis but later moved to Chicago. Its business, during the period involved in this action, was exclusively the transportation of freight in interstate commerce as a common carrier. Originally, it carried freight only from St. Louis to New York, but, in order to secure the advantages of a two-way haul, it set up facilities to obtain goods for shipment from the east to the west and, in particular, shipment of less than full truck loads. In addition to its terminals in St. Louis and New York, it set up terminals in Chicago, in New Britain and Bridgeport, Connecticut, and in cities in Massachusetts, Rhode Island and New Jersey. Where a full truck loan is to be shipped to or from any customer in Connecticut, trucks making the long haul go directly to the customer's place of business. In case of smaller shipments, the freight is taken from the customer's place of business by pickup trucks to the terminal, where it is transshipped to the long-haul trucks. The pickup trucks merely act as a part of the interstate transportation of the freight. The busi-

ness of the company as outlined above was established prior to the enactment by the Congress of the "Motor Carrier Act, 1935"; 49 Stat. 543, 49 U. S. C. § 301 (1940) et seq.; it carried on its business thereafter under a provision in that act allowing it to continue to operate as it was doing on June 1, 1935, until in February, 1942, it received a permit from the interstate commerce commission. Of its total business during the years 1936 to 1940, the following portions originated in, was attributable to or was derived from this state: 1936, 47 per cent of a total business of $233,787.78; 1937, 37.86 per cent of a total business of $440,025.92; first five months of 1938, 47 per cent of a total business of $318,786.85; last seven months of 1938, 50 per cent of a total business of $432,087.39; 1939, 42 per cent of a total business of $1,202,210.35; 1940, 34 per cent of a total business of $1,723,510.65.

The plaintiff uses in the operation of its business about 85 trucks or tractors and 115 trailers. Most of these are leased from the Wallace Transport Company. This is a corporation organized by officers of the plaintiff; the plaintiff furnished the money to purchase the vehicles; and all the capital stock of the Transport Company is owned by the same four persons who own all the stock of the plaintiff, that is, its two principal officers and their wives. The Transport Company was organized under the laws of Illinois, for the purpose of securing certain advantages in reciprocity agreements between that state and other states and to avoid certain taxes which would otherwise be imposed upon it by states through which it carries freight. All the drivers of the trucks are employees of and are paid by the plaintiff. Several of the pickup trucks are registered with the motor vehicle department of this state in the name of the plaintiff and during the years involved in this action it obtained permits to purchase tires from the rationing board at New Britain for

its commercial vehicles registered in this state. It leases its terminals at New Britain and Bridgeport. It owns personal property in Connecticut consisting of office equipment valued at $1500 to $2000, upon which it pays property taxes in New Britain. It has a bank account in Bridgeport for the deposit of cash payments made by shippers, but no one in this state has authority to draw upon it; all checks received in this state are sent to Chicago and cash received at New Britain is converted into bank drafts and sent to Chicago; and, except for a small amount of cash kept at New Britain to pay incidental expenses, all expenses and wages of employees are paid by draft on the plaintiff at Chicago. The plaintiff employed ten persons at Bridgeport and seventeen persons at New Britain; of these, five persons, employed two or three at a time, were engaged in soliciting business, straightening out complaints and generally promoting the plaintiff's business.

In connection with the leasing of its terminal at New Britain, the landlord insisted that the plaintiff qualify in Connecticut as a foreign corporation and name the secretary of the state as its agent for service so that it would be subject to the jurisdiction of our courts in the event that litigation should arise out of the lease; the plaintiff did so qualify on May 5, 1934; this was apparently done under § 3489 of the General Statutes, which provides that every foreign corporation having an office or place of business in this state shall, before entering upon such business, appoint the secretary of the state its attorney for the service of process; but the plaintiff never otherwise applied for or received authority to do business in this state, and its business is limited entirely to interstate commerce as specified by permits from the Connecticut public utilities commission. In accordance with the requirement of the Motor Carrier Act, 1935, 49 Stat. 564, 49 U. S. C. § 321(c), (1940), it also designated a person in New Haven upon whom process might be served.

Under the appellate procedure in this state, we are bound to take the finding of facts made by the trial court as conclusive, unless on proper assignments of error we add facts which are admitted or undisputed or strike out findings made without evidence to support them or correct a finding made in language of doubtful meaning. Practice Book § 353. The plaintiff seeks neither corrections in nor additions to the finding. The defendant seeks certain additions and corrections but we can make none that is material to the issues before us. We note that a considerable amount of the testimony and certain of the exhibits concerned matters which occurred subsequently to the period for which the assessments in this case were made, and so are only indirectly, if at all, relevant to the issues presented by the pleadings. For example, the federal interstate motor carrier permit under which the plaintiff now operates and as to which there is much testimony was not issued until February 10, 1942, while the last year involved in the assessments before us was 1940; and the only significance of that permit was that in the main it permitted the plaintiff to continue the same operations upon which it had been engaged on June 1, 1935. Arguments of counsel have also dealt with matters not germane to the specific issues before us. We have confined ourselves to the law, facts and evidence bearing upon the validity of the particular assessments in question in this proceeding.

We consider first the question whether the business carried on by the plaintiff is within the purview of the act imposing the corporation business tax. The statute under which the taxes involved in this action were imposed was originally enacted as the result of a report (Report on Taxation of Certain Corporations [1913]) of a special commission appointed pursuant to an act of the General Assembly passed in 1911 to examine the matter of taxing corporations in this state. Public Acts, 1911,

Chap. 283, § 2. The recommendations of that commission were almost all enacted into law at the legislative sessions of 1913 and 1915. See *Connecticut Light & Power Co.* v. *Walsh*, 134 Conn. 295, 304, 57 A. 2d 128. Part 4 of chapter 292 of the Public Acts of 1915 was headed "Miscellaneous Corporations," and it is the predecessor of the Corporation Business Tax Act of 1935. It imposed a tax upon certain "companies" based upon their net earnings; and in § 19 it defined "company" as including "every corporation, joint stock company or association carrying on business in this state which is required to report to the collector of internal revenue for the district in which such company has its principal place of business for the purpose of the assessment, collection, and payment of an income tax." with the exception of corporations as to which either in the same chapter or in chapter 188 of the Public Acts of 1913 special provision had been made, or which were not considered subject to a state tax, as in the case of banking institutions organized under the laws of the United States. The chapter provided for a tax not only upon domestic corporations but, under § 22, upon any company which "carries on business outside of this state," with provisions for the apportionment of a part of the net income as the basis of the tax. In the case of a corporation doing business outside the state which derived profits "principally from the sale or use of tangible personal property," the proportion of the net income allocated to this state was based upon the ratio which the value of its real and tangible personal property in this state bore to the value of its entire real estate and tangible personal property. The definition of "company" remained the same until 1935, when its language was changed although its substance was not altered in any respect material to the issues before us; General Statutes, Cum. Sup. 1935, § 417e; but provisions for the allocation to this state of a portion of

the net income of companies doing business outside the state were materially changed. Cum. Sup. 1935, § 420c. We shall later refer at some length to the basis of that allocation, but for our present purposes it is only necessary to note that the allocation in this case could only be made by virtue of provisions beginning, "when derived from the manufacture, sale or use of tangible personal or real property" in this state. In 1937 the definition quoted above from the 1915 act was altered so that, for the words "carrying on business in this state," there were substituted the words "carrying on, or having the right to carry on, business in this state"; Sup. 1937, § 255d; Cum. Sup. 1939, § 354e; but the words above quoted from the section of the 1935 act concerning the basis for the allocation of net income where a company does business outside the state remained unchanged in the 1939 amendment. Cum. Sup. 1939, § 356e.

There can be no question that the plaintiff was doing business within this state, though that business was interstate in character. As we shall point out later, the tax imposed is upon the franchise or privilege of a corporation to do business within the state; and nothing in the statute indicates an intent to tax only domestic corporations carrying on interstate business. In *Underwood Typewriter Co.* v. *Chamberlain*, 94 Conn. 47, 108 A. 154, involving the 1915 act, we expressly stated (p. 55) that it applied alike to foreign and domestic companies; and in *Slater Mills, Inc.* v. *Gilpatric*, 97 Conn. 521, 117 A. 806, we held that the statute applied to a Massachusetts corporation doing business in this state. If there could be any doubt that such a business as that of the plaintiff was within the purview of the act, it is removed by two amendments to the act. At the 1935 session of the General Assembly, another provision of our laws which imposed a tax upon the gross income from unincorporated business was amended to exclude income of "motor trans-

portation business from interstate commerce"; Cum. Sup. 1935, § 458c; and had the General Assembly intended a like exclusion in the case of business corporations it would no doubt have so stated. At the 1937 session, as we have noted, the act was made to apply not only to companies carrying on business in the state but also to companies having the right to do so. It is true that provisions for the allocation of income for taxing purposes are based upon the use of real or personal property in this state. The value of the plaintiff's personal property in this state is small and no value is placed in the finding upon its leaseholds. But obviously these were the means adopted by it for the successful operation of its business in this state, and no doubt they were of material service in producing the large proportion of the plaintiff's business which is attributable to Connecticut. The business conducted by the plaintiff is within the purview of the Business Corporation Tax Act of 1935.

Previous to 1913, corporations in this state had in general been subject only to the ordinary property taxes. The special tax commission appointed in 1911 discussed the various methods of taxing corporations in effect in different jurisdictions and concluded that gross earnings was the most reasonable basis for taxing them. The commission stated (p. 4): "The earnings of a corporation are the real basis of the value of its property, the value of its securities and its taxpaying ability." It rejected, however, net earnings as the measure of the tax, because it regarded them as affording an impractical basis, and added, as a second reason (p. 5): "A further objection arises from the fact that a corporation might have no net earnings whatever in a given year, and therefore escape taxation entirely. While it is true that this might be perfectly just under a tax system based fundamentally upon income, we should bear in mind that the American tax system is today based upon prop-

erty. The individual whose property has yielded him no income in a given year cannot offer that as a reason why he should not pay taxes on his property. While the importance of treating corporations and individuals upon the same footing must not be stretched, there can be little doubt that a tax system which would allow corporations having no net earnings to escape taxation entirely would be out of harmony with the general tax system prevailing in America today." In discussing the rate of a tax upon gross earnings, the commission stated (p. 8): "Here we may fairly assume . . . that the object should be to impose a tax burden upon the corporations which shall be as nearly equivalent as possible to the burden of taxation borne by other wealth under the general property tax." The commission then proceeded to set forth a method by which it believed that result could be accomplished; and it went on to discuss the taxation of various types of public utility corporations, banks, insurance companies, and building and loan associations.

The report considered at some length the problem presented by interstate commerce. It stated (p. 17): "Just as a tax imposed upon the property of a corporation should fall only upon its property located within the State imposing the tax, so the tax on gross earnings must be imposed only upon such share of the gross earnings as may fairly be assigned to the State imposing the tax. We are for the present concerned only with the question of economic justice as between States and not with any constitutional question. Where corporations are doing business of an interstate character it is necessary, therefore, to devise some equitable rule by which the gross earnings may be apportioned as between the State imposing the tax and other States. To make the apportionment as exact as possible we should assign to the State imposing the tax all earnings from business

performed wholly within the State. We should exclude all business done wholly without the State. We should then assign to the State in question its share of all business which crosses the State line." As to the constitutionality of such a tax, the commission said (p. 18): "First of all, there is no question of the general principle that all laws which impose taxes directly upon receipts from interstate commerce are in violation of the Federal Constitution and void. On the other hand, the right of a State to impose taxes upon the property of corporations within its borders is unquestioned, even though the corporations be engaged in interstate commerce. Again, a State may value the property of corporations by the 'unit rule'; that is, may ascertain the total value of the entire system and then apportion to the State in question a share of the entire property according to the ratio of the mileage within the State to the total mileage of the system, or according to the ratio of business done within the State to the business of the whole system. In arriving at the value of the property of a corporation a State is free to make its earnings, either net or gross, the basis. . . . It appears, therefore, that there can be no question of the right of a State to impose a tax at a given rate upon the earnings of a corporation as an exclusive tax, and in lieu of all other taxes upon the property of the corporation, provided the resulting burden is fairly measured so as not to be in excess of the burden which would be imposed by a tax on the ad valorem basis."

The report of the special commission leaves no doubt that it proposed a tax upon corporations which would represent a share of the general tax burden as nearly equivalent as possible to the burden borne by other taxpayers under the property tax laws, and that gross earnings were recommended as the basis for determining that share as fairly as might be done. The legislature

at its 1913 session did not adopt any act imposing a tax upon corporations generally. The tax commissioner in his report for the years 1913 and 1914 recommended among other matters for the consideration of the General Assembly (p. 61) "The imposition of an annual franchise tax on all general corporations organized in the State, and a similar tax on foreign corporations doing business in the State." The General Assembly, in disregard of the advice of the commission that the tax be based on gross income, assessed it upon the basis of net income. Public Acts, 1915, Chap. 292, § 23. Section 22 of the 1915 act provided as follows: "If such company carries on business outside of this state, a portion of the net income on which the tax is imposed by the United States shall be apportioned to this state as follows: In case of a company deriving profits principally from the ownership, sale, or rental of real estate, and in case of a company deriving profits principally from the sale or use of tangible personal property, such proportion as the fair cash value of its real estate and tangible personal property in this state on the date of the close of the fiscal year of such company in the year next preceding is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction on account of any incumbrance thereon; in case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this state for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the state." That the General Assembly chose to base the tax not upon gross income but upon net income, a method discussed by the commission in its report but rejected by it for the reasons we have stated, does not show that the underlying nature of the tax was intended to be other than that advocated by the com-

mission. In 1917 the General Assembly provided that the tax imposed by the 1915 act should be in lieu of all taxes which otherwise would be laid on moneys and credits, including accounts receivable, and of all taxes upon the franchises of domestic corporations except an existing tax on capital stock, and "in lieu of all other taxes on the privilege of doing business within this state upon the foreign corporations" liable to taxation under the law. Public Acts, 1917, Chap. 299, § 6.

In 1919, in the case of *Underwood Typewriter Co.* v. *Chamberlain*, 94 Conn. 47, 108 A. 154, affirmed 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165, the plaintiff, a Delaware corporation which had a manufacturing plant in this state and did business here and in other states, appealed from the apportionment and assessment of a tax against it based upon the provisions of the statutes we have referred to, and attacked the constitutionality of the tax as applied to it. The case was reserved for advice as to certain questions involved in the action, and in answering those questions we held the tax not to be in violation of the federal constitution. In the course of the opinion, we said (p. 54): "It is necessary in the first place to determine the nature of the tax complained of. The State contends that it is in the nature of an excise tax, the plaintiff that it is a tax on property, and the brief filed by the *amicus curiae* that it is an income tax. We think the State is right in its characterization of the tax. It is not a tax on property; the plaintiff pays a separate local tax on its property. This tax falls on income and not on property. If the plaintiff had made no net income for the year 1915, it would have escaped this tax altogether, although its taxable property in Connecticut on July 1st, 1915, remained the same as before. It is not an income tax, as such, because it is assessed only if and when the corporation does business within the State, and

in the case of domestic corporations doing business in this and other States there is no attempt to assert personal jurisdiction for the purpose of taxing their entire income. Foreign and domestic corporations are treated alike, and the entire income is not taxed unless the entire business of the corporation is done within the State. It is apparent, therefore, that the basis of the tax is not jurisdiction over the property or over the person of the corporation, but jurisdiction over its business; and that it is a tax in the nature of an excise tax levied against domestic and foreign corporations alike, for the privilege of doing business in a corporate capacity within this State." Then, referring to the 1917 act, we proceeded (p. 55): "The legislative construction thus put upon Part IV of the Act, although not in itself conclusive, is consistent with its practical consequences, and accords with the conclusion already stated. The fact that the tax is measured by a percentage of net income, or, in the case of a corporation engaged in interstate commerce, by a percentage of a part of its net income proportioned to the amount of its tangible property in this State, does not, of course, prevent it from being an excise or privilege tax." We said further (p. 64): "The legislature evidently intended to make the tax proportionate to the value of the privilege."

In a report of a temporary tax commission appointed under an act passed by the General Assembly at its 1933 session, and mistakenly referred to in the opinion of the Circuit Court (*Spector Motor Service, Inc.* v. *Walsh*, 139 F. 2d 809, 811) as the genesis of the law, the tax was discussed at considerable length Report of the Connecticut Temporary Commission to Study the Tax Laws of the State and Make Recommendation concerning Their Revision (1933) p. 447 et seq. and spoken of at times as an income tax; but the decision from which we have quoted was referred to, and its language adopted as the proper

characterization of the tax. The first recommendation of the commission was (p. 459): "That the state taxes on miscellaneous corporations be clearly designated as franchise taxes." In accordance therewith, in a redraft of the statute enacted in 1935, the section imposing the tax requires each corporation within the statute to pay annually "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state"; General Statutes, Cum. Sup. 1935, § 418c; and this language has since been retained. Cum. Sup. 1939, § 354e; Sup. 1941, § 176f; Sup. 1947, § 295i.

While the report of the 1933 commission taken literally might be regarded as recommending that a legislative construction be placed upon the act, which, as we said in *Underwood Typewriter Co.* v. *Chamberlain*, 94 Conn. 47, 55, 108 A. 154, would not be conclusive, the language used in the amendment definitely fixes for the time after it was enacted the character of the tax the legislature intended to impose. The tax is then a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign. *Stanley Works* v. *Hackett*, 122 Conn. 547, 551, 190 A. 743. Net earnings are used merely for the purpose of determining the amount to be paid by each corporation, a measure which, by the application of the rate charged, was intended to impose upon each corporation a share of the general tax burden as nearly as possible equivalent to that borne by other wealth in the state. As regards a corporation doing business both within and without the state, the intention was, by the use of a rather complicated formula, to measure the tax by determining as fairly as possible the proportionate amount of its business done in this state. There is no ground upon which the tax can be said to rest upon the use of highways by motor trucks, as the Circuit Court suggests (*Spector Motor Service, Inc.* v. *Walsh*, 139 F. 2d 809, 815) for

obvious reasons: It is a genral law applying not only to corporations engaged in motor trucking but to all corporations; and, when it was first enacted, such transportation played a very small, if any, part in the life of the community, and no subsequent action by the legislature has so changed the nature of the tax as to bring in such considerations. In this respect the report of the temporary tax commission appointed under the act of the 1933 session of the General Assembly is interesting in that it discussed (p. 482 et seq.) such a tax upon commercial motor vehicles and, for reasons given, recommended that it be not imposed, and it has not been enacted into law.

Section 418c of the 1935 act imposed a tax of 2 per cent upon "every mutual savings bank, savings and loan association and building and loan association doing business in this state, and every other corporation or association carrying on business in this state" which is required to report to the collector of internal revenue, "to be measured by the entire net income as herein defined received by such corporation or association from business transacted within the state during the income year," with a provision not material to the issues before us that, with certain exceptions, the tax should not be less than a minimum computed under § 421c of the act. Section 419c provided that, in determining net income, "there shall be deducted . . . all items deductible under the federal corporation net income tax law effective and in force on the last day of the income year, except (1) federal taxes on income or profits, losses of prior years, interest received from federal, state and local government securities and specific exemptions, if any such deductions shall be allowed by the federal government and (2) interest and rent paid during the income year." The report of the temporary tax commission of 1933 (p. 457) gives this reason for the exclusion from permissible deduction of "interest received from

federal, state and local government securities": "It has been pointed out that the inclusion of such income in the tax base would result in a small aggregate increase in the burden of the corporation net income tax upon miscellaneous corporations at the same time that it would substantially increase revenues from the bank tax over what could be anticipated from the narrower income tax base. Furthermore, we see little reason for differentiating, in a business tax, between income derived from investments in stocks and government securities and income derived from other investments." The report also, in recommending the exclusion from permissible deductions of "interest and rent paid during the income year" stated (p. 455): "A business tax should not depend upon the financial organization of a corporation but rather upon the amount of business done. This is not related to the amount of capital invested by stockholders or the equity of stockholders in the assets of the corporation, but rather to the amount of capital used in the business whether borrowed or contributed by stockholders. To satisfy this requirement, it is necessary to redefine net income so as to include payments and accruals to the credit of all contributors of capital—that is, rental and interest payments and accruals as well as net profits." In *W. T. Grant Co.* v. *McLaughlin*, 129 Conn. 663, 667, 30 A. 2d 921, referring to page 423 of that report, we said: "The purpose of not permitting the deduction of rents and interest is to arrive at a truer value of the assets employed in a business and prevent the avoidance of the tax burden by poor management, excessive salaries, a top-heavy financial structure or the like." See *House of Hasselbach* v. *McLaughlin*, 127 Conn. 507, 509, 18 A. 2d 367. The only change made in this statute as it appeared in the 1939 Supplement to the General Statutes was that previously noted, the insertion of the words "or having the right to carry on business" in the provision first quoted from it above.

Having thus determined the basis of the tax as applied to corporations generally, the General Assembly turned to corporations whose business was partly out of the state. Section 420c begins: "If the trade or business of the taxpayer shall be carried on partly without the state, the business tax shall be imposed on a base which reasonably represents the proportion of the trade or business carried on within the state. The allocation of the base of the tax measured by net income shall be made on the following basis." The statute then goes on to fix that basis as quoted in the footnote.[1] This method was in effect recommended

[1] "(1) Interest, dividends, royalties and gains from sales of tangible assets, less related expenses, when received by a company having its principal place of business within the state, shall be allocated to the state and, when received by a company having its principal place of business without the state, shall be allocated without the state; provided, when it can be clearly established that such income is received in connection with business within the state, such income shall be allocated to the state without regard to the location of the principal place of business of the taxpayer, and a similar rule shall apply to such income received in connection with business without the state; (2) gains from sales or rentals of tangible capital assets held, owned or used in connection with the trade or business of the taxpayer but not for sale or for rent in the regular course of business shall be allocated to the state if the property sold or rented be situated in the state if the property sold or rented be situated in the state prior to the sale or during the rental thereof, otherwise such gains shall be allocated outside the state; (3) net income of the above classes having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows: (a) Such income, when derived from business other than the manufacture, sale or use of tangible personal or real property, shall be specifically allocated within and without the state under rules and regulations of the tax commissioner; (b) when derived from the manufacture, sale or use of tangible personal or real property, the portion thereof attributable to business within the state shall be determined by means of an allocation fraction to be computed as the simple arithmetical mean of three fractions. The first of these fractions shall represent that part of the average monthly fair cash value of the total tangible property held and owned by the taxpayer

[Footnote continued on following page.]

by the commission of 1933, which, in its report, stated (p. 458): "The principal considerations in an allocation scheme are three in number. The scheme should produce substantially equitable results; it should be sufficiently flexible to take care of exceptional cases within the law; and it should conform as closely as possible to the allocation methods employed in other states. After working upon this problem for a decade, a committee of the National Tax Association has concluded that these ends may best be attained by means of the so-called Massachusetts plan, a plan now in use in five states and similar to the plans in use in six other states. This scheme involves the separate allocation of certain items of net income which can be clearly apportioned to a given state. The net income so allocated usually includes interest, rentals, royalties, and gains from the sale of capital assets. The remaining net income is then allocated according to a fraction which is arrived at by taking the simple arithmetic average of three other fractions. These three fractions consist of (1) the ratio of tangible property within the

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[Footnote continued from preceding page.]

during the income year which is held within the state, without deduction on account of any incumbrance thereon but excluding any property the income of which is separately allocated under the foregoing provisions of this chapter. The second fraction shall represent the part of the total wages, salaries and other compensation to employees paid by the taxpayer during the income year from offices, agencies or places of business within the state, provided all such payments shall be assigned to the office, agency or place of business of the taxpayer at which the employee chiefly works or from which he is sent out or with which he is chiefly connected. The third fraction shall represent the part of the taxpayer's gross receipts from sales or other sources during the income year, excluding any income which is specifically allocated under subdivisions (1) and (2) of this section, which is assignable to offices, agencies or places of business within the state, provided such receipts shall be assigned to that office, agency or place of business at or from which the transactions giving rise thereto are chiefly negotiated and executed."

state to all tangible property, (2) the ratio of gross receipts assignable to the state to total gross receipts, and (3) the ratio of the payrolls of all places of business within the state to total payrolls. It is commonly provided that upon application of the taxpayer approved by the tax commissioner this arbitrary allocation fraction need not be used (1) when it produces inequitable results and (2) when the accounts of the taxpayer permit the use of the separate accounting method of apportionment. When neither the separate accounting method nor the statutory allocation fraction is applicable, the tax commissioner is usually given the power to make the allocation according to his best judgment. The experience of other states is that few such cases arise."

Section 424c of the 1935 law required each company subject to the tax to file a return upon forms prescribed by the tax commissioner which should give the necessary data for the computation of the tax, and provided that it should be filed on or before the first day of April in each year, except when the income year differed from the calendar year, in which event it was to be filed within ninety days after the end of the fiscal year. While amended in some details, this continued to be the law when the taxes in question before us were assessed. Cum. Sup. 1939, § 358e. Section 426c provided that any company might make a supplemental return in certain cases within such reasonable time as the tax commissioner might prescribe, and required that, if the return to the collector of internal revenue should be corrected in any respect affecting the tax imposed by the act, a supplemental return should be made within ten days after receipt of notification of the correction. This section was somewhat changed by amendments in 1937 and 1939, but in no respect material to the issues before us. Sup. 1937, § 257d; Cum. Sup. 1939, § 359e. Section 427c of the

1935 law provided: "Failure to file returns. Any company which shall fail to make any return required by the provisions of this chapter within the time limit specified herein shall pay a penalty of five dollars, which penalty shall be added to the amount of tax assessed against such company and shall be paid at the time of paying such tax. If any such company shall not have made its annual return within three months after the time specified in section 424c, the commissioner, within three years of the due date of the tax which would be properly based upon such return, shall make such return, according to the best information obtainable and according to the form prescribed, and to the tax imposed upon the basis of such return he shall add twenty-five per cent thereof or fifty dollars, whichever is greater." This law was in effect when the taxes in question in this case were assessed.

Section 431c requires each company making a return to compute the tax payable and accompany the return with cash or check in payment of it; the commissioner was required to examine the return and in case any error was discovered notify the taxpayer; within thirty days thereafter he was to pay any additional amount due; but, if any rebate was due him, this was to be paid to him by the state treasurer on order of the comptroller. Section 434c provides that any taxpayer having paid any tax under the act who was aggrieved as regards the imposition of the tax or of any penalty might apply to the commissioner within thirty days after notice for a hearing to secure a correction of the tax; the commissioner was required promptly to consider any such application and might grant or deny a hearing, giving notice of his action and, if the application was granted, of the time and place of hearing; after a hearing the commissioner might make such order as appeared to him just and lawful and

notify the taxpayer of it; and the commissioner might on his own initiative order a hearing. Section 435e provides that "any taxpayer aggrieved because of any tax laid" under the act might within one month from the time provided for the payment of the tax appeal to the Superior Court in Hartford County; the court was authorized to grant "such relief as may be equitable" and to direct the state treasurer to pay "the amount of such relief" to the taxpayer, with interest at 6 per cent. These provisions were in effect when the taxes involved in this action were assessed.

From the exhibits made a part of the finding of the trial court, it appears that for each of the periods in question the plaintiff first filed as a return the blank required by the tax commissioner but gave no figures; and to it was annexed, "for the purpose of informing the Tax Commissioner," an affidavit in which it set forth that it was engaged solely in interstate commerce and claimed that it was not liable to the tax. For the periods June 1, 1935 to May 31, 1936, June 1, 1936 to May 31, 1937, and June 1, 1937 to May 31, 1938, it later filed amended returns, which were filled out. The trial court has found that the tax commissioner assessed taxes for the periods in question to a total principal amount of $6,122.77, which, with the addition of interest and penalties, makes the amount claimed by the state $7,795.50. We assume in default of anything in the record indicating the contrary that for the periods for which the plaintiff filed no returns giving figures the commissioner acted under the provisions of § 427c set forth above. The amounts so found by the court are taken from an exhibit offered in evidence through the senior examiner in the tax commissioner's office, and, while they do not in all respects correspond with the notices of assessment addressed to the plaintiff and attached to the returns offered in evidence, no question has

been raised as to the accuracy of the examiner's computation. Nor is it claimed that proper notice of the assessments was not given to the plaintiff.

As we understand the plaintiff's brief, it bases its claims that the tax violates the constitution of this state upon two grounds. The first is that, as this tax is not imposed upon partnerships or individuals engaged in businesses like those carried on by corporations within the provisions of the act, there results an unconstitutional classification. In the first place, no provision of our constitution requires that taxation shall be equal and uniform; *State* v. *Murphy*, 90 Conn. 662, 668, 98 A. 343; *State ex rel. Brush* v. *Sixth Taxing District*, 104 Conn. 192, 204, 132 A. 561; *Montgomery* v. *Branford*, 107 Conn. 697, 707, 142 A. 574; and in *New Haven Metal & Heating Supply Co.* v. *Danaher*, 128 Conn. 213, 219, 21 A. 2d 383, we adopted, with reference to a taxing statute, a statement made in *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989, that a classification must "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy." In *Silver* v. *Silver*, 108 Conn. 371, 143 A. 240, aff'd, 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221, we upheld the constitutionality of a statute restricting the liability of drivers of automobiles to guests riding in them although it was claimed to be an unjustifiable classification in that a like restriction did not apply to guests riding in other vehicles, and we said (p. 378): "Primarily the question of classification is for the legislature and the courts will not interfere unless the classification is clearly unreasonable."

Opinion of Connecticut Supreme Court of Errors.

The question whether the act results in an unconstitutional classification is very definitely presented by a provision in our taxing statutes to which we have previously referred but which is not cited in the plaintiff's brief. During the period in question the statutes imposed a tax upon "Unincorporated Business" based upon the gross income from business "conducted within the state, but not including gross income of retail and wholesale mercantile business from sales in interstate commerce nor gross income of motor transportation business from interstate commerce." Cum. Sup. 1935, § 458c. Section 461c provided that in the case of business not entirely conducted in this state the tax should be computed on the gross income from that part of it carried on within the state. The statutes contain provisions for no other tax upon such business except ordinary property taxes. In § 457c, motor transportation business was defined as "the carrying for hire of goods, wares, merchandise or passengers in or upon a motor vehicle," except passenger business subject to a tax under another provision of the statute. The effect of these provisions read in conjunction with the general tax imposed upon corporations is that, while a corporation engaged in interstate commerce is subject to a tax upon its net income, an unincorporated business of like nature is subject to no tax except the ordinary property tax. If we were considering the application of the federal constitution in this case, this situation would make necessary a careful consideration of *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927, which reversed a decision of the Pennsylvania Supreme Court in *Commonwealth* v. *Quaker City Cab Co.*, 287 Pa. 161, 169, 134 A. 404, and in which it was held that a statute imposing a tax upon the gross receipts of foreign and domestic corporations from the operation of taxicabs

in intrastate transportation of passengers violated the federal constitution because it failed to impose a like tax upon the receipts of individuals and partnerships engaged in the same kind of business. The authority of the decision of the Supreme Court of the United States seems to us to have been greatly weakened by the decision in *White River Lumber Co.* v. *Arkansas*, 279 U. S. 692, 49 S. Ct. 457, 73 L. Ed. 903, where the court upheld as not violative of the federal constitution a statute authorizing the collection of back taxes upon lands of a corporation which did not apply to lands of natural persons, and the distinction made between that case and the *Quaker City Cab Co.* case does not commend itself to us, as it did not to the three dissenting justices in the *White River Lumber Co.* case.

Be that as it may, we have no doubt of the power of our General Assembly to impose upon corporations a tax such as that provided in the act of 1935 even if it does not lay a like tax upon natural persons doing the same type of business. The distinction is well pointed out in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 161, 31 S. Ct. 342, 55 L. Ed. 389: "The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence

of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals." These considerations may not apply to their full extent as regards a foreign corporation doing business in a state; but it remains true that such a corporation brings with it many of the advantages inhering in its entity as an artificial person. The exclusion of motor transportation business from the tax on unincorporated business was introduced into the statutes of 1935, no doubt as a result of the conclusion of the temporary tax commission that a tax on the gross earnings of persons engaged in interstate business would be held invalid; (Report, p. 455); and there was no intent unjustly to discriminate between corporations engaged in interstate motor freight business within the Corporation Business Tax Act and natural persons carrying on a similar business. The application of the act to the plaintiff is an incident to the operation of a law intended to be broad in scope. Inequalities and discriminations frequently arise from the necessity that a statute shall, in its classifications, be couched in general terms. *Doncourt* v. *Danaher*, 126 Conn. 678, 685, 13 A. 2d 868; *Lyman* v. *Adorno*, 133 Conn. 511, 522, 52 A. 2d 702. The fact that the Corporation Business Tax Act imposes a tax burden upon the plaintiff as a corporation which a natural person engaged in a like business does not have to bear does not under our constitution invalidate the imposition of the tax on it. See note, 71 A. L. R. 265.

The other ground upon which the plaintiff claims that the imposition of the tax upon it violates our constitution is that subsection (a) of §420c, quoted above in the footnote, vests the tax commissioner with a broad authority

without any adequate specifications by the General Assembly of standards and without laying down an intelligible principle to which an administrative officer must conform. *Connecticut Baptist Convention* v. *McCarthy*, 128 Conn. 701, 704, 25 A. 2d 656. That subsection provides that in determining the allocation fraction for interstate business, after the net income has been separately allocated and deducted, the remaining net income is to be apportioned as follows: "(a) Such income, when derived from business other than the manufacture, sale or use of tangible personal or real property, shall be specifically allocated within and without the state under rules and regulations of the tax commissioner." The plaintiff does not point out nor does it appear on the face of the record that the commissioner in making the assessments against the plaintiff acted under this provision of the statute; so far as appears he applied subdivision 3 (b), to which the plaintiff's claim has no application; and the plaintiff is in no position to attack the constitutionality of the law on this ground. *State* v. *Sinchuk*, 96 Conn. 605, 615, 115 A. 33.

In computing the tax against the defendant, the tax commissioner added to the plaintiff's net income as reported to the collector of internal revenue 40 per cent of the rent paid the Wallace Transport Company for the hire of its trucks. In view of the reasons for not permitting the deduction of "rent" in determining the basis of the state tax which we have stated, we conclude that the word was not used by the General Assembly in its technical meaning of compensation paid for the occupancy of real property but includes money paid for the use of personalty. We applied the statute to sums paid for rental fees for personal property in *W. T. Grant Co.* v. *McLaughlin*, 129 Conn. 663, 668, 30 A. 2d 921. The reason for deducting only 40 per cent of the sum actually paid

for the use of the trucks was because the attorney general of the state had advised a predecessor of the defendant in a somewhat similar case to deduct from the agreed rent expenses assignable to salaries and wages, gasoline, oil and other related expenses created by the operation of the trucks, in order to arrive at an actual rental value. As a result of that opinion the then tax commissioner took evidence from various trucking firms and arrived at 40 per cent as a mean ratio. The agreement before the attorney general when he gave his opinion was not one for the payment of a fixed rental but the charge was to be "the fair and reasonable value of the service rendered." Without considering whether his opinion would apply fully to a case where there was a fixed rent, we point out that no facts before us indicate that 40 per cent was not a fair basis of value for the expenses deducted from the rent, and in the absence of such facts we cannot find that the plaintiff was harmed by being charged with only 40 per cent of the rent it paid. The only other attack made upon the correctness of the commissioner's computation is that the tax should have been computed under subsection (a), above quoted, and not under other provisions of the act. As we have previously pointed out, the statute applies to the plaintiff because its income is derived from the use of personal property in the state, and the commissioner was right in not assessing the tax upon the basis of subsection (a).

The defendant claims error in the admission of evidence as to the reason why the plaintiff qualified with the secretary of the state under the provision of § 3489 of the General Statutes. We do not regard the reasons given as material to the issues before us, and so cannot find the error, if one was committed, other than harmless. We note also that both the Circuit Court of Appeals and the United States Supreme Court state this as among the

facts they considered; *Spector Motor Service, Inc.* v. *Walsh*, 139 F. 2d 809, 811; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 102, 65 S. Ct. 152, 89 L. Ed. 101; and it can at least serve to complete the picture they will have before them on a rehearing of the case in the federal courts.

The trial court should not have decided whether the Corporation Business Tax Act was in violation of the United States constitution, because that question, as we have stated, is still before the federal courts for decision. Its other conclusions were correct.

There is error in part, the judgment is set aside and the trial court is directed to enter judgment as on file, except that the judgment that the Corporation Business Tax Act was violative of the constitution of the United States should be eliminated.

In this opinion the other judges concurred.

Motion to Dissolve Injunction.

IN THE UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT

Civil Action File No. 723

SPECTOR MOTOR SERVICE, INC., a Corporation

v.

CHARLES J. McLAUGHLIN, Tax Commissioner;
WALTER W. WALSH, Substituted Defendant.

Whereas this suit was first brought to this Court by summons and complaint dated March 9, 1942 seeking to enjoin the enforcement of the Connecticut Corporation Business Tax Act of 1935 against the plaintiff and for a declaratory judgment and

Whereas, after due hearing, judgment was entered by this Court December 19th, 1942 declaring that the plaintiff is not subject to the tax, and enjoining the defendant from attempting to collect the tax from the plaintiff (47 F. Supp. 671), and

Whereas, this decision was appealed to the Circuit Court of Appeals, 2nd Circuit, on January 29, 1943, and after due hearing judgment was filed January 20, 1944 reversing the judgment of said District Court (139 Fed. 2nd 809), and

Whereas, the case then came to the Supreme Court of the United States on an Order Allowing Certiorari, dated May 22, 1944, and

Whereas, said United States Supreme Court decided on December 4, 1944 that this litigation in the Federal Court should be held pending determination in the State Court of Connecticut of the application and constitutionality of the Connecticut Corporation Business Tax Act as applied to the plaintiff under local law, and

Whereas, the Supreme Court of the United States vacated the judgment of the Circuit Court of Appeals and remanded the cause to the District Court with directions to retain the bill pending determination of proceedings in the State Court (323 U. S. 101), and

Whereas, pursuant to the direction of the Supreme Court of the United States, an action for a declaratory judgment was brought by writ and complaint dated December 21, 1944 in the Superior Court for Hartford County, State of Connecticut, and after due and full hearing a judgment was entered determining the issues (August 13, 1947), and

Whereas, an appeal was then taken to the Supreme Court of Errors of the State of Connecticut and, after due hearing, the questions presented as to the validity and construction of the Corporation Business Tax Act of 1935 and the validity of certain assessments against the plaintiff thereunder, were decided in an opinion of the Court at its May Term, 1948 (135 Conn. 37), and

Whereas, the Supreme Court of Errors of the State of Connecticut, as it interpreted the decision of the United States Supreme Court, undertook and did answer the following three questions:

1. Was it the intention of the General Assembly, as evidenced in the statute, to impose the tax upon persons engaged in interstate commerce in pursuit of the type of business in which the plaintiff was engaged?;

2. If so, what aspect of its business was intended to be made the subject of the tax?;

3. Upon what basis was it intended that the tax should be computed?

and the Court assumed that it was also proper for it to consider and answer the following questions:

1. Whether the tax violated in any respect the Constitution of the State of Connecticut?;

2. Whether the amount of tax has been properly determined under our statutes?; and

Whereas, said Supreme Court of Errors of the State of Connecticut in its decision appears to have answered these questions as follows:

1. The business carried on by the plaintiff is within the purview of the Act imposing the Corporation business tax;

2. The tax is a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in this State, whether they be domestic or foreign, and net earnings are used merely for the purpose of determining the amount to be paid by each corporation, a measure which, by the application of the rate charged, was intended to impose upon each corporation a share of the general tax burden as nearly as possible equivalent to that borne by other wealth in the State;

3. As regards a corporation doing business both within and without the State, the intention was, by the use of the prescribed formula as more fully set forth in the opinion, to measure the tax by determining as fairly as possible the proportionate amount of its business done in this State.

Motion to Dissolve Injunction:

The Court also decided:

1. That the tax as imposed violated in no respect the Constitution of the State of Connecticut.

2. That the tax was properly computed under the statute.

WHEREFORE, in view of the decision of the Supreme Court of Errors of the State of Connecticut on the questions as directed by the Supreme Court of the United States, motion is respectfully made that this Court review its previous decision in the light of this Opinion and dissolve the injunction previously ordered.

THE DEFENDANT

By: WILLIAM L. HADDEN,
Attorney General

FRANK W. FLOOD
Assistant Attorney General

Motion to Substitute William F. Connelly as Party Defendant.

IN UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT

Civil Action No. 723.

SPECTOR MOTOR SERVICE, INC., a Corporation

v.

CHARLES J. McLAUGHLIN, Tax Commissioner;
WALTER W. WALSH, Substituted Defendant.

February 11, 1949

The defendant in the above-entitled action represents that Walter W. Walsh, Tax Commissioner of the State of Connecticut, who was substituted as a party defendant in this action in place of Charles J. McLaughlin resigned, by order of this Court dated November 6, 1942, has also resigned his office as Tax Commissioner of the State of Connecticut, and has been succeeded in that office by William F. Connelly, a citizen and resident of Connecticut.

Wherefore, the plaintiff prays that an order may enter substituting the said William F. Connelly, Tax Commissioner of the State of Connecticut, as party defendant in lieu of Walter W. Walsh.

DEFENDANT by

WILLIAM L. HADDEN,
Attorney General, State of Connecticut

FRANK W. FLOOD
Assistant Attorney General, State of Connecticut

Motion to Substitute William F. Connelly as Party Defendant.

A copy of this motion has been personally served upon the Honorable Cyril Coleman, a member of the Law Firm of Day, Berry and Howard, Attorneys for the Plaintiff.

FRANK W. FLOOD

Order Substituting William F. Connelly as Party Defendant.

IN UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 723.

SPECTOR MOTOR SERVICE, INC., a Corporation

v.

CHARLES J. McLAUGHLIN, Tax Commissioner;
WALTER W. WALSH, Substituted Defendant.

as of February 11, 1949.

Upon the foregoing application, it is hereby ordered that William F. Connelly, a citizen and resident of the State of Connecticut, Tax Commissioner of the State of Connecticut, be substituted as party defendant in lieu of Walter W. Walsh.

/s/ J. JOSEPH SMITH
United States District Judge

Motion to Substitute Dennis P. O'Connor as Party Defendant.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action. File No. 723.

SPECTOR MOTOR SERVICE, INC., a Corporation

vs.

CHARLES J. McLAUGHLIN, Tax Commissioner;
WILLIAM F. CONNELLY, Substituted Defendant.

October 6, 1949

The defendant in the above-entitled action represents that William F. Connelly, Tax Commissioner of the State of Connecticut, who was substituted as a party defendant in this action in place of Walter W. Walsh, resigned, by order of this Court dated February 11, 1949, has been succeeded in that office at the end of his appointive term in said office on July 1, 1949 by Dennis P. O'Connor, a citizen and resident of Connecticut.

Wherefore, the defendant prays that an order may enter substituting the said Dennis P. O'Connor, Tax Commissioner of the State of Connecticut, as party defendant in lieu of William F. Connelly.

DEFENDANT by

WILLIAM L. HADDEN,
Attorney General, State of Connecticut

FRANK W. FLOOD
Assistant Attorney General,
State of Connecticut

Motion to Substitute Dennis P. O'Connor as Party Defendant.

A copy of this motion has been personally served upon the Honorable Cyril Coleman, a member of the Law Firm of Day, Berry and Howard, Attorneys for the Plaintiff.

FRANK W. FLOOD

Order Substituting Dennis P. O'Connor as Party Defendant.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action. File No. 723.

SPECTOR MOTOR SERVICE, INC., a Corporation

vs.

CHARLES J. McLAUGHLIN, Tax Commissioner; WILLIAM F. CONNELLY, Substituted Defendant.

October 7, 1949.

Upon the foregoing application, it is hereby ordered that Dennis P. O'Connor, a citizen and resident of the State of Connecticut, Tax Commissioner of the State of Connecticut, be substituted as party defendant in lieu of William F. Connelly.

C. C. HINCKS
United States District Judge

Memorandum of Decision on Motion to Dissolve Injunction.

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF CONNECTICUT

Civil Action No. 723

SPECTOR MOTOR SERVICE, INC., a Corporation,
Plaintiff

v.

CHARLES J. McLAUGHLIN, Tax Commissioner;
DENNIS P. O'CONNOR, Substituted Defendant,
Defendant

This action was brought under the name of Spector Motor Service, Inc. v. McLaughlin by complaint filed March 9, 1942 by plaintiff, an interstate motor truck freight carrier, to enjoin the then State Tax Commissioner of Connecticut from proceeding against the plaintiff under the Connecticut Corporation Business Tax Act, and for declaratory judgment of non-liability. This Court, by judgment filed December 21, 1942, granted the relief sought, on the theory that the tax, if intended to be applied to a carrier in the position of the plaintiff, was a tax on the privilege of doing solely interstate business, prohibited by the Commerce Clause (Article 1, Section 8) of the federal Constitution. This Court, therefore, construed the Tax Act as not intended to apply to one in the position of the plaintiff. *47 F. Supp. 671.*

The Circuit Court of Appeals for the Second Circuit reversed by judgment entered January 20, 1944, ordering judgment for the defendant on the merits, holding that the trend of decisions on state tax cases attacked under

the Commerce Clause made it apparent that the Supreme Court would uphold such a tax as the instant one applied to the plaintiff, that it was intended to apply to the plaintiff and, as so applied, not in violation of the state or federal Constitutions. The Court stressed the fairness of the method of allocation of the tax to income derived from business originating within the state and concluded that the Supreme Court would look beyond the formal classification of the tax as one upon the privilege of doing an interstate business, and uphold it as a fair charge upon the taxpayer for the state's services to it. *139 F. 2d 809.*

The Supreme Court granted certiorari, *322 U. S. 720,* and by mandate dated January 7, 1945, vacated the judgment of the Circuit Court of Appeals and remanded the cause to this Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the state court in conformity with the opinion of the Supreme Court dated December 4, 1944, holding that the federal Courts should defer determination of the Constitutionality of the state tax act until the state courts had an opportunity to determine the application and Constitutionality of the act as applied to the plaintiff under local law. *323 U. S. 101.*

Action for declaratory judgment was brought in the Superior Court for Hartford County by writ and complaint dated December 21, 1944. The Superior Court entered judgment on August 14, 1947, Judge Comley holding that the Act was intended to apply, and does apply, to the plaintiff as a carrier engaged exclusively in interstate commerce, that, as so applied, it is unconstitutional and void as in violation of the Commerce Clause (Article 1, Section 8) of the federal Constitution, that, as applied to the plaintiff, the Act is not unconstitutional and void under the Connecticut Constitution, and that the assessments made by the defendant are not illegal because computed on an improper base. *15 Conn. Sup. 205.*

Memorandum of Decision on Motion to Dissolve Injunction.

The Supreme Court of Errors, by its decision of July 21, 1948, sustained the judgment except insofar as it held the Act to be violative of the Commerce Clause of the federal Constitution, considering that, in the course of this litigation, the Supreme Court intended that question to be determined by the federal Courts. *135 Conn. 37.* The Supreme Court of Errors in its opinion undertook to answer the questions as to the interpretation of the Act posed by the opinion of the Supreme Court of the United States in this action.

Thereafter, on February 11, 1949, defendant moved in this court for dissolution of the injunction entered herein on December 21, 1942. It was decided by the parties that no further evidence would be submitted, and the motion to dissolve the injunction is before the Court on briefs, of which the last were submitted October 8, 1949.

At the outset we must determine whether this Court should pass upon the motion on its merits, due to the uncertainty which existed as to the adequacy of the state court remedy at the time when this action was instituted, (see opinion of the Circuit Court of Appeals 139 F. 2d 809, 820), although, for the future, the opinion of the Supreme Court of Errors may be said to remove the uncertainty and point to a remedy by action for injunction in the state courts.

The Supreme Court of Errors of Connecticut having held that there is a plain, speedy, and efficient remedy available to the taxpayer in this case, petitioner now urges that this fact defeats the jurisdiction of this court. Cases cited to the point, however, hold only that the question of jurisdiction may be raised at any time, and are confined to situations in which the original jurisdiction is attacked later in the trial.

This point has been considered and decided in *Dawson* v. *Kentucky Distilleries Co.* (1921) 255 U. S. 288, holding

that jurisdiction to enjoin the collection of a state tax when the remedy in the state courts is uncertain is not defeated by a state decision settling the remedy subsequent to the institution of the suit for injunction.[1]

The next question is whether the interpretation of the Act by the Supreme Court of Errors requires a change in our opinion that, as applied to the plaintiff, it is a tax or excise upon the privilege of carrying on interstate commerce.

Compare also the diversity-of-citizenship cases wherein it is held that jurisdiction depends on the facts at the time the suit is brought and is not divested by subsequent changes. *Hardenbergh* v. *Ray*, 151 U. S. 112 (1894); *Mullen* v. *Torrance*, 9 Wheat. 537 (1824), and a similar rule applied to patent infringement injunctions, *Rice & Adams* v. *Lathrop*, 278 U. S. 509 (1929); *Clark* v. *Wooster*, 119 U. S. 322 (1886).

Of course, if the facts remain as found on the first trial, we would ordinarily be bound to follow the majority

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[1] See opinion at page 295 (Brandeis, *J.*):

"The Attorney General insists that these bills in equity should have been dismissed because each plaintiff had a plain, adequate and complete remedy at law . . . The plaintiffs, it is said, should have paid the tax under protest and have sued at law to recover the amounts so paid. But when these suits were brought (April and May, 1920) the decisions of the highest court of the State left it at least doubtful whether money so paid could have been recovered at law by the taxpayer . . . It was not until November 16, 1920, which was after these appeals had been entered in this court, that *Craig* v. *Security Producing & Refining Co.*, 189 Kentucky 565, 568, settled that money paid under such circumstances could be recovered . . . But whatever remedies section 162 is now regarded as conferring, it is clear that at the time this suit was brought they were not regarded in Kentucky as sufficiently adequate to oust the jurisdiction of equity to enjoin the illegal collection of taxes . . . Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available. *Beedle* v. *Bennett*, 122 U. S. 71; *Busch* v. *Jones*, 184 U. S. 598.

opinion of the then Circuit Court of Appeals as to the law applicable. This would not follow here, however, if the Supreme Court of Errors has so interpreted the Act in question as to alter some of the bases of the then Circuit Court's opinion. And since that opinion, on the law, is frankly based on a forecast of a changing trend of Supreme Court decisions, if any evidence of actual decisions in the field in the intervening years exists, it must be considered in order to forecast the probabilities at this time, and the earlier forecast can hardly be safely followed as the law of the case.

If we still consider that this tax is a tax or excise levied upon the privilege of doing a business solely interstate in nature, it would appear that a majority of the present Court would hold it in violation of the Commerce Clause—that is, the four justices who dissented in *Pipe Line Co. v. Stone*, —— U. S. —— June 20, 1949, and Mr. Justice Burton, who concurred in the judgment in that case solely on the ground that the commerce taxed was intrastate.

The opinion of the Supreme Court of Errors makes it plain that the tax was intended to be a franchise tax upon the privilege of doing business in the state.

There are cogent arguments in favor of permitting some form of non-discriminatory taxation of interstate carriers to compensate the states for the services each renders to them. A tax upon the franchise to operate in interstate commerce, however, is an exaction for a privilege no state has the power to grant. To allow the states to go so far as formally to claim such a power cannot help but weaken the federal protection of the free flow of commerce over our state lines. Our dislike of sharp practice by carriers seeking to avoid a fair share of the tax load should not lead us to undermine it.

We may take it that the opinions in the *Pipe Line* case indicate that the Courts will still require the states to

spell out a sound basis for their exactions from those engaged solely in interstate commerce other than the franchise to engage in such commerce.

The motion to dissolve the injunction is denied.

Dated at Hartford, Connecticut, this 18th day of October, A. D., 1949.

J. Joseph Smith
United States District Judge

Amendment to Findings of Fact and Conclusions of Law.

DISTRICT COURT OF THE UNITED STATES

District of Connecticut

Civil Action No. 723

Spector Motor Service, Inc., a Corporation
Plaintiff

v.

Charles J. McLaughlin, Tax Commissioner;
Dennis P. O'Connor, Substituted Defendant,
Defendant

The Findings of Fact and Conclusions of Law heretofore filed herein are amended as follows:

Strike out *Finding* #2 and insert new Finding #2 as follows—

2. Defendant O'Connor is a citizen of the State of Connecticut and a resident in said state, and is the Tax

Amendment to Findings of Fact and Conclusions of Law.

Commissioner of the State of Connecticut, having been appointed and duly qualified following the termination of service in said office of the defendant Connelly.

Finding #4, line 1: After "Connecticut" insert "at the time of commencement of action herein".

Finding #4, lines 2, 5 and 8: Strike out "is" and insert "was".

* * * *

Strike out Conclusions of Law #4, #5 and #8 and insert new Conclusion #4, as follows:

4. The Connecticut Corporation Business Tax Act of 1935 as amended was intended to apply to the plaintiff in the years here in question as a franchise tax for the privilege of doing business in Connecticut, and, as so applied to the plaintiff, is in violation of Article 1, Section 8, of the Constitution of the United States and is unenforceable against the plaintiff.

Dated at Hartford, Connecticut, this 1st day of November, A. D., 1949.

J. Joseph Smith
United States District Judge

Judgment and Order Denying Motion to Dissolve the Injunction.

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF CONNECTICUT

Civil Action No. 723

SPECTOR MOTOR SERVICE, INC., a Corporation,
Plaintiff

v.

CHARLES J. McLAUGHLIN, Tax Commissioner;
DENNIS P. O'CONNOR, Substituted Defendant,
Defendant

Defendant having moved to dissolve the injunction heretofore entered herein, and both parties by their counsel having been heard,

IT IS ORDERED, ADJUDGED and DECREED that the motion to dissolve the injunction be, and it is hereby, denied.

Dated at Hartford, Connecticut, this 1st day of November, A. D., 1949.

J. JOSEPH SMITH
United States District Judge

Notice of Appeal to the Circuit Court of Appeals for the Second Circuit Under Rule 73 of the Rules of Civil Procedure for the District Courts of the United States.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 723.

SPECTOR MOTOR SERVICE, INC.,

Plaintiff

vs.

CHARLES J. McLAUGHLIN, Tax Commissioner: DENNIS P. O'CONNOR, Substituted Defendant,

Defendant.

Notice is hereby given that Dennis P. O'Connor, Tax Commissioner of the State of Connecticut, substituted defendant for the named defendant, Charles J. McLaughlin, Tax Commissioner, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final judgment for the plaintiff and against the defendant, dated November 1, 1949, denying the motion of the defendant to dissolve the injunction, entered in this action on December 19, 1942, and from each and every part thereof.

Dated at Hartford, Connecticut, November 23, 1949.

DENNIS P. O'CONNOR, Tax Commissioner of the State of Connecticut

By: WILLIAM L. HADDEN
Attorney General

FRANK W. FLOOD

Frank W. Flood
Assistant Attorney General

Notice of Appeal to the Circuit Court of Appeals for the Second Circuit Under Rule 73 of the Rules of Civil Procedure for the District Courts of the United States.

To Clerk of the United States District Court for the District of Connecticut, New Haven, Connecticut.

A copy of this notice has been personally served upon the Honorable Cyril Coleman, a member of the Law Firm of Day, Berry and Howard, Attorneys for the Plaintiff.

FRANK W. FLOOD

Frank W. Flood

Stipulation as to Record on Appeal.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 723

SPECTOR MOTOR SERVICE, INC.,

Plaintiff

vs.

CHARLES J. McLAUGHLIN, Tax Commissioner;
DENNIS P. O'CONNOR, Substituted Defendant,

Defendant

1. Transcript of Record from original summons and complaint dated March 9, 1942 up to and including order allowing Certiorari to the Supreme Court of the United States, dated May 22, 1944, as printed for the United States Supreme Court, the October Term, 1944, No. 62.

2. Mandate of the Supreme Court of the United States dated January 7th, 1945 and filed in the United States District Court for the District of Connecticut on January 8, 1945.

3. Opinion of the Supreme Court of Errors of the State of Connecticut dated July 21, 1948, in the case of *Spector Motor Service, Inc.* v. *Walter W. Walsh, Tax Commissioner*, 135 Conn. 37.

4. Motion To Dissolve Injunction filed in the United States District Court for the District of Connecticut on February 11, 1949.

5. Motion and Order to substitute William F. Connelly as party defendant filed in the United States District Court for the District of Connecticut on February 11, 1949.

6. Motion and Order to substitute Dennis P. O'Connor as party defendant filed in the United States District Court for the District of Connecticut on October 7, 1949.

7. Memorandum of Decision on Motion To Dissolve Injunction dated October 18, 1949 and filed October 19, 1949.

8. Amendment to Findings of Fact and Conclusions of Law dated November 1, 1949 and filed on November 2nd, 1949.

9. Judgment and Order Denying Motion to Dissolve the Injunction dated November 1, 1949, and filed on November 2nd, 1949.

10. Notice of Appeal To The Circuit Court of Appeals for the Second Circuit under Rule 73 of the Rules of Civil Procedure For The District Courts of the United States dated and filed November 23, 1949.

11. Stipulation as to Record on Appeal dated December , 1949.

12. Certificate of Clerk of the United States District Court for the District of Connecticut as to the Record on Appeal.

Stipulation as to Record on Appeal.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record in the above-entitled matter, as agreed upon by the parties.

Dated: December 14, 1949.

WILLIAM L. HADDEN,
Attorney General, State of Connecticut

FRANK W. FLOOD
Frank W. Flood
Assistant Attorney General,
State of Connecticut
Attorneys for Defendant-Appellant

DAY, BERRY AND HOWARD
By: CYRIL COLEMAN
Attorneys for Plaintiff-Appellee

United States District Court Clerk's Certificate.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 723

SPECTOR MOTOR SERVICE, INC., a Corporation,
Plaintiff-Appellee,

—against—

CHARLES J. McLAUGHLIN, Tax Commissioner;
DENNIS P. O'CONNOR, Substituted Defendant,
Defendant-Appellant.

United States of America,
District of Connecticut—ss.:

I, C. E. PICKETT, Clerk of the United States District Court for the District of Connecticut, hereby certify the foregoing to be a true and complete transcript of the record, according to the stipulation of counsel herein filed and in accordance with Rule 75(f) of the Federal Rules of Civil Procedure, in the above-entitled cause.

The last day to file record is January 2, 1950.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New Haven, in the District of Connecticut, this 15th day of December, in the year of our Lord one thousand nine hundred and forty-nine and of the Independence of the said United States the one hundred and seventy-four.

/s/ C. E. PICKETT
Clerk

(Seal)

Opinion of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 180—October Term, 1949.

(Argued March 7, 1950 Decided March 29, 1950.)

Docket No. 21557

SPECTOR MOTOR SERVICE, INC.,
Plaintiff-Appellee,

—v.—

DENNIS P. O'CONNOR, Tax Commissioner,
Defendant-Appellant.

Before:

SWAN, CLARK and FRANK,
Circuit Judges.

Appeal from the United States District Court for the District of Connecticut.

Action by Spector Motor Service, Inc., against Charles J. McLaughlin, for whom first Walter W. Walsh and now Dennis P. O'Connor has been substituted as successor, Tax Commissioner of the State of Connecticut, for an injunction and a declaratory judgment of its nonliability for the Connecticut Corporation Business Tax. From a final judgment denying defendant's motion to dissolve an injunction heretofore granted, defendant appeals. Reversed.

See also 47 F. Supp. 671, 139 F. 2d 809, and 323 U. S. 101.

FRANK W. FLOOD, Asst. Atty. Gen., State of Conn., of Hartford, Conn. (William L. Hadden, Atty. Gen., State of Conn., of Hartford, Conn., on the brief), *for defendant-appellant.*

CYRIL COLEMAN, of Hartford, Conn. (Day, Berry & Howard, of Hartford, Conn., on the brief), *for plaintiff-appellee.*

CLARK, *Circuit Judge*:

This case has had a long and circuitous history in both the federal and the state courts. It concerns the power of the State of Connecticut to collect a tax computed on net income apportioned to state business of an interstate trucking concern engaged in collecting freight within the State and transporting it by truck to Chicago and St. Louis. The tax assessments involved are for the years 1936 through 1940 and amount to a total of $6,122.77, plus a 25 per cent penalty and interest. Authority for the tax was found by the Tax Commissioner in the Corporation Business Tax Act of 1935, Cum. Supp. 1935, c. 66b, §416c *et seq.*, as amended, Conn. Gen. Stat. 1949, c. 91, §1896 *et seq.* This action for an injunction and a declaratory judgment of nonliability to the tax, brought by a Missouri corporation engaged exclusively in interstate trucking against the Commissioner, was begun on March 9, 1942. Obviously principle here has been more important than the amount of revenue immediately forthcoming; but to the thirty or more states which have adopted this form of statute developed by the National Tax Association and which are

said to be awaiting the outcome of this case,[1] the answer has not been swiftly forthcoming.

After the initial trial, the plaintiff on November 14, 1942, obtained a ruling from the district court that it was entitled to an injunction against the collection of the tax and a declaration that plaintiff was not subject to it. This was based upon the court's conclusion that if the tax were applicable to plaintiff it must be held invalid as a burden on interstate commerce, in violation of Art. I, §8, of the Constitution of the United States, and that to avoid such a holding it should be construed as inapplicable. *Spector Motor Service, Inc.* v. *McLaughlin*, D. C. Conn., 47 F. Supp. 671. On appeal from the judgment and declaration thus entered, we reversed, holding the tax applicable to plaintiff and valid as not burdensome to interstate commerce. *Spector Motor Service, Inc.* v. *Walsh*, 2 Cir., Dec. 24, 1943, 139 F. 2d 809. The Supreme Court granted certiorari, 322 U. S. 720, and held that the federal courts should defer determination of the constitutionality of the state tax until the state courts had an opportunity to determine the application and constitutionality of the tax as applied to plaintiff under local law. Accordingly it remanded the cause to the district court with directions to retain the bill pending the determination of proceedings to be brought in the state court to settle the issues of local law. *Spector Motor Service, Inc.* v. *McLaughlin*, Dec. 4, 1944, 323 U. S. 101.

An action for a declaratory judgment was immediately instituted in the Superior Court of Connecticut, but did not go to judgment until August 1947, when that court held the tax applicable to plaintiff and an unconstitutional burden on interstate commerce. 15 Conn. Sup. 205. Upon appeal the Supreme Court of Errors of Connecticut held

[1] See 96 U. of Pa. L. Rev. 274 n. 1, and the Report of the Connecticut Temporary Commission to Study the Tax Laws, 1934, cited in our earlier decision and in that of the state court.

the tax clearly applicable to plaintiff and not in violation of the state constitution, but struck out the decision based on the federal constitution, holding that this question was already before the federal courts and that its answer was properly to be left to them. *Spector Motor Service, Inc.* v. *Walsh*, 135 Conn. 37, 61 A. 2d 89. In February 1949 defendant moved in the district court for dissolution of the injunction, and last fall that court ruled that since the tax had been held to apply to plaintiff it must be held unconstitutional. This appeal is therefore from its refusal to dissolve the injunction.

The facts of this case are set forth in detail in our earlier opinion, 139 F. 2d 809, a familiarity with which is assumed. For our present purposes we may quote this succinct statement by the distinguished Chief Justice of Connecticut: "The tax is then a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign. *Stanley Works* v. *Hackett*, 122 Conn. 547, 551, 190 A. 743. Net earnings are used merely for the purpose of determining the amount to be paid by each corporation, a measure which, by the application of the rate charged, was intended to impose upon each corporation a share of the general tax burden as nearly as possible equivalent to that borne by other wealth in the state." 135 Conn. 37, 61 A. 2d 89, 98. As will be seen, the terms here used become of some importance in the discussion. It is to be noted, however, that, as the court is at pains to point out, the tax is not upon income as such, not even local net income; but special and ingenious provisions for the allocation of income are employed in a conscious endeavor to equate the tax fairly between local and nonlocal activities. Thus in the case of income from the use of tangible real or personal property an allocation fraction for the net income is found as the mean or average of three ratios: that of tangible property within the state to all tangible

property of the taxpayer; that of wages and salaries paid within the state to all wages and salaries; and that of gross receipts assignable to the state to all gross receipts. How cautious is the impost is shown by the tax here assessed for 1940. Plaintiff's total receipts for that year were $1,723,510.65, of which $587,975.59 arose in Connecticut; while its net income was $426,291.01. But application of the formula gave an allocation mean of .157508, resulting in an allocation to state business of $67,304.24 net income, with a 2 per cent tax thus amounting to $1,346.08. 139 F. 2d 809, 812.

Before proceeding to the merits of the issue before us, we must consider the contention of the Tax Commissioner that the federal courts no longer have jurisdiction to decide this issue. 28 U. S. C. A. §1340 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." When we considered this case before, our independent examination confirmed the conclusion reached below and agreed to by both parties that this prohibition did not apply, since we found doubt as to the nature of a state remedy. 139 F. 2d 809, 819-822. In this the Supreme Court specifically agreed, holding that the district court had jurisdiction to give whatever relief was appropriate, despite the statute, "because of the uncertainty surrounding the adequacy of the Connecticut remedy." 323 U. S. 101, 105, 106. In our decision we were at pains to point out that the Connecticut Supreme Court of Errors had it within its powers to clarify the situation; and this it has now done in its opinion in this case by pointing out the availability locally of an action for a declaratory judgment or an injunction. 135 Conn. 37, 61 A. 2d 89, 92. Its action has led to the new contention of the defendant that plaintiff must now be dismissed to start all over in another tribunal.

We do not think that this present determination that Connecticut does offer a remedy ousts us of our jurisdiction. The Supreme Court held, per Mr. Justice Brandeis, in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, that where no adequate state remedy could be clearly seen at the time an action was instituted in the federal courts, federal jurisdiction was not defeated by a subsequent opinion of the state supreme court pointing out an available remedy. See also *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 215. This is not to deny the possibility that the parties might have brought a swifter end to these overlengthy proceedings by petitioning for certiorari from the decision of the Connecticut Supreme Court of Errors. Indeed the refusal of that court to consider the federal question has been the subject of critical comment. 1 Stanford L. Rev. 551. But since that course was not taken and since the federal court had proper jurisdiction when this action was begun, we hold that it continues until a final determination of the important issue involved.

When we had this case before us six years ago we expressed the view that earlier decisions, of which *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203, was the principal authority, were against the validity of a state tax levied upon even net income of a corporation engaged solely in interstate commerce. But on examination of the broad trends in favor of the state-taxing power shown by the Supreme Court, we concluded that the *Alpha Portland Cement* case and its progeny were no longer controlling and that as of that date the validity of such a tax as this would be sustained. We are now called upon to re-examine our conclusions to see if, as indeed the learned trial judge thought, later developments show that we were in error.

Before embarking upon this task, we think it needful that we redefine what we conceive to be our functions as judges of a constitutionally inferior court; for it seems

It has been thought in some quarters that our previous attempt to study doctrinal trends as to the fate of state taxation in interstate commerce was only an endeavor to guess the votes of Supreme Court justices. We certainly have no desire either to psychoanalyze or to Gallup-poll the Court and its newer members, nor do we conceive that to be greatly useful to it or to others. We recognize, too, that it would be futile and undignified not to yield obeisance to ancient precedents solely because we personally think they have outlived their usefulness; but it would be equally futile to press them upon the parties when they are no longer more than wraiths. It is our duty to discover if there exists a fairly debatable issue where the bonds of stare decisis are wearing thin, and, if we do, then to resolve it on reason and persuasion, not by any supposed count of noses. When this case was before us earlier, we thought we did discover such an issue. Events in the meantime tend to confirm us more strongly in that view: the later history of this very case, the learned comments about it, the recent precedents as we read them, indeed the very divisions in the Court on this vital issue. We recognize full well that it is not our province to terminate the dispute with finality; but we think we aid that end more by trying to act judicially than merely prophetically. The magnitude of the constitutional issue here involved affecting the taxing economy of a majority of the states and having repercussions in the terms of the very union itself deserves such treatment and such treatment alone at our hands. So we shall set forth our analysis of the legal situation and our reasoned conclusions as to the controlling law without attempting to guess which justices or how many, if any, may agree with us.

Scholars who have analyzed the many cases in which during the last decade the Supreme Court has had to measure the conflicting claims of state-taxing power and the commerce clause tell us that two theories of drawing the line

between these claims have been variously in vogue. Hellerstein, *State Franchise Taxation of Interstate Businesses*, 4 Tax L. Rev. 95, 1948; Dunham, *Gross Receipts Taxes on Interstate Transactions*, 47 Col. L. Rev. 211, 1947; Powell, *More Ado About Gross Receipts Taxes*, 60 Harv. L. Rev. 501, 710, 1947; Cahill, *State Taxation of Interstate Commerce*, 27 Ore. L. Rev. 97, 1948; Overton, *State Taxation of Interstate Commerce*, 19 Tenn. L. Rev. 870, 1947; Note, *Gross Receipts Taxes: A Change in Doctrine*, 56 Yale L. J. 898, 1947; Comment, 46 Mich. L. Rev. 50, 1947. These theories have been based upon the application of either the "multiple burdens" or the "direct-indirect" tests, so called. Under the multiple burdens test, only such state taxes on interstate business are invalid as are susceptible of being imposed with equal right by other states, so that interstate commerce is required to bear a heavier burden of taxation than is intrastate commerce. This test was stated in such cases as *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 115 A. L. R. 944; *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 117 A. L. R. 429; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 128 A. L. R. 876; its origins go all the way back to *Case of the State Freight Tax*, 15 Wall. 232, 280, 82 U. S. 232. A principal touchstone of taxability under these decisions is fair apportionment of the tax. Where an allocation formula is employed which makes the amount of the tax commensurate with the receipts, the income, or the property of the taxpayer within the taxing state, the tax is held valid. This concern with a fair apportionment of a tax has been reemphasized as lately as in *Central Greyhound Lines of N. Y.* v. *Mealey*, 334 U. S. 653, 663, where the entire Court was in agreement that even a tax on gross income is to be upheld if it is justly apportioned. See Rec. Dec., 47 Mich. L. Rev. 576, 1949; Note, 17 U. of Cin. L. Rev. 378, 1948.

If the multiple burden test is today the criterion of taxability, then we think this Connecticut tax is surely valid. As we have noted, it shows great ingenuity in its provisions for allocating the taxpayer's net income so that Connecticut is taxing only the amount fairly attributable to this state. Thus not only is the unfairness of a tax on gross receipts avoided, but even the net income is apportioned only according to a standard set by a triple test of tangible property, wages and salaries, and gross receipts within the state as against the taxpayer's totals everywhere. By these careful provisions Connecticut ensures that even though every other state in which the taxpayer does business should impose a similar tax the taxpayer would not be suffering a multiple burden. The apportioned tax requires of a taxpayer merely that he pay his fair share of the costs of government of Connecticut, commensurate with the benefits which he receives from that government. "Even interstate business must pay its way." *Postal Telegraph-Cable Co.* v. *City of Richmond*, 249 U. S. 252, 259; *Western Live Stock* v. *Bureau of Revenue*, *supra*, 303 U. S. 250, at 254.

The other test, that a tax which directly burdens interstate commerce is invalid, while one which indirectly burdens such commerce can be supported, furnished the criterion for decisions in this field for many years. It has been recently enunciated in such cases as *Freeman* v. *Hewit*, 329 U. S. 249, and *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U. S. 422. Under this test only can substantial question be raised as to the tax before us; but applying it also we conclude that the present tax is valid, since it is fundamentally a net income, rather than a gross receipts, tax. Indeed, the classic statement of the "direct-indirect" test is in *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, where a state tax measured by net income was held valid. Justice Pitney, for the Court, noted that a gross receipts tax is a direct burden on com-

merce, since it takes a share from every dollar of sales, regardless of whether the sale was profitable, and thus can make all the difference between profit and loss. A net income tax, however, does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. "Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states." *Id.* at 328-9; *cf. Peck & Co.* v. *Lowe*, 247 U. S. 165.

A recent decision of the Supreme Court lends support to this analysis. In *West Pub. Co.* v. *McColgan*, 27 Cal. 2d 705, 166 P. 2d 861, the California supreme court upheld a net income tax on a publisher who shipped books into the state to fill orders. The United States Supreme Court affirmed this decision in a short *per curiam* opinion, 328 U. S. 823. The grounds for the decision are not clear; it is possible that the Court may have concluded that the activity of the publisher's salesmen within California was a taxable local incident, which could be considered apart from the sales themselves in interstate commerce. But the four cases which the Court cited as authority for its affirmance[2] make it seem even more possible—if indeed the

[2] *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649; *International Shoe Co.* v. *State of Wash., Office of Unemployment Compensation and Placement*, 326 U. S. 310, 161 A. L. R. 1057.

facts of themselves do not—that the result followed the view that a net income tax, even on an exclusively interstate business, is an indirect burden on commerce and thus valid. One scholar has concluded that if such analysis is accurate "a properly apportioned net income tax as applied to exclusively interstate business would have easy sailing in the Court." *Hellerstein, supra*, 4 Tax L. Rev. 95, at 113.

In two quite recent cases, *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, and *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, the Supreme Court has had occasion to pass on the validity of taxes on carriers engaged exclusively in interstate commerce. In view of the divisions within the Court, there is in neither case a majority opinion which can be relied upon as giving the rationale of the Court's decision; the significant fact nevertheless is that in both cases, for whatever reason and by whatever margin, the validity of the state tax was sustained. And it seems to us that the tax before us is a better and a fairer tax than either of the Mississippi taxes there upheld. The *Memphis Natural Gas Co.* case involved a franchise tax on corporations doing business within the state, measured as a percentage of the value of the capital used in the State. In the *Interstate Oil Pipe Line Co.* case the tax was a gross receipts tax; a rather crude apportionment was achieved by limiting the tax to the receipts for transporting oil on pickup lines within the state into the main interstate pipe line.

The pickup oil lines in the *Interstate Oil Pipe Line Co.* case are no more state-taxing subjects than are the pickup trucks by which the taxpayer here assembles a load of freight from various shippers before sending a truck across the country. In such factual aspects the cases are closely parallel. But here we have a careful adjustment of net income and a careful rule of apportionment to the state making the amount of taxation so small that the state cannot be accused of unfairness. And while the ta[illegible] in the

Memphis Natural Gas Co. case was apportioned, the apportionment was solely on the basis of the capital involved, rather than by the more delicate and accurate formula involved in the Connecticut tax. It has been said of the *Memphis* case that it "completes the extension to state taxes on interstate transportation companies of the tolerance which the court has displayed toward state taxes on interstate sales." 62 Harv. L. Rev. 138; 47 Mich. L. Rev. 115, 117. Such tolerance seems well deserved in a case such as ours where there has been a careful attempt to do no more than ask interstate commerce to pay its way.

We should not be understood as claiming that the constitutionality of a tax should depend upon the name the legislature has given it. "We are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels." Rutledge, *J.*, in *Interstate Oil Pipe Line Co.* v. *Stone, supra,* 337 U. S. 662, at 666. Hence we do not suggest that the tax is automatically constitutional merely because it is measured by net income, and a net income tax has been held to be an indirect burden. Rather we should look to the actual operation of the tax and decide whether it discriminates against interstate commerce, whether it is unduly burdensome to interstate commerce, whether it attempts to reach activities outside the borders of the state, and whether it is susceptible of being repeated by any other state. If these questions are answered in the negative, if the tax is a fair and a just attempt to make all commerce, intrastate and interstate, bear its share of the costs of government, then the tax should be held valid.

Emphasis upon substance and a wariness as to labels is especially necessary as to a state tax termed an excise upon the privilege of doing business within the state. It is an easy slide from this to the thought that what is taxed is "the franchise to operate in interstate commerce," an "exaction for a privilege no state has power to grant" as even

the learned trial judge here puts it. This we venture to suggest is a pervasion of the thought behind the label. What the state wants is no exaction for interstate operations, but a fair return for what the state gives.[3] The tax would certainly be the same under various other labels, such as a net income tax, a corporation business tax, or what not. The label as chosen seems obviously designed to express the purpose and the fair rationale behind the state's revenue program; it would be ironic were this to be held to defeat the tax as against, say, the cruder tax upheld in the *Interstate Oil Pipe Line Co.* case. If anything, the label here should be an aid, rather than a drawback, to its view in proper perspective.

The Connecticut tax here involved does not discriminate against interstate commerce. It is not burdensome to interstate commerce. It does not attempt to reach activities beyond the borders of Connecticut. It is not susceptible of being repeated by any other state. It is not a levy upon the privilege of engaging in interstate commerce. It is a proper and reasonable excise upon the privileges which Connecticut freely grants to all alike. Therefore we regard it as valid.

We add that we see no reason to vary our previous conclusion that the tax does not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

Reversed; judgment to be entered for defendant on the merits.

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3. "Two State Commissioners are studying ways and means of making large out-of-state trucks pay for their wear and tear on Connecticut highways. Highway Commissioner G. Albert Hill disclosed the State's 'free ride' dilemma. He said he has discussed the situation with Motor Vehicles Commissioner Cornelius F. Mulvihill preparatory to making his recommendation to Governor Bowles." An dispatch from Hartford to the New Haven Register, March 9, 1950.

Dissenting Opinion.

SWAN, *Circuit Judge, dissenting*:

In my opinion the order should be affirmed for the reasons stated by the district judge and by Judge Learned Hand in his dissent on the former appeal, 139 F. 2d 822-3.

Judgment.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of March one thousand nine hundred and fifty.

Present:

HON. THOMAS W. SWAN,
HON. CHARLES E. CLARK,
HON. JEROME N. FRANK,
Circuit Judges.

SPECTOR MOTOR SERVICE, INC.,
Plaintiff-Appellee,

v.

PENNIS P. O'CONNOR, Tax Commissioner, etc.,
Defendant-Appellant.

Appeal from the District Court of the United States for the District of Connecticut.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M BELL CLERK

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

SPECTOR MOTOR SERVICE, INC.

-v-

O'CONNOR, Commissioner, etc.

180

JUDGMENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MAR 29 1950
ALEXANDER M BELL CLERK

United States Court of Appeals
Clerk's Certificate.

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, ALEXANDER M. BELL, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 200, inclusive, contain a true and correct transcript of the record and proceedings had in said Court, in the case of

SPECTOR MOTOR SERVICE, INC.,
Plaintiff-Appellee,

v.

DENNIS P. O'CONNOR, Tax Commissioner, etc.,
Defendant-Appellant,

as the same remain of record and on file in my office.

TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of May in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the said United States the one hundred and seventy-fourth.

ALEXANDER M. BELL
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950
No. 132

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
JUN 15 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, [redacted] 1950

No. 132

SPECTOR MOTOR SERVICE, INC., a Corporation,
Petitioner,

vs.

CHARLES J. McLAUGHLIN, Tax Commissioner,
DENNIS P. O'CONNOR, Substituted Defendant,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE COURT PRESS, 130 Cedar Street, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. .

SPECTOR MOTOR SERVICE, INC., a Corporation,
Petitioner,

vs.

CHARLES J. McLAUGHLIN, Tax Commissioner,
DENNIS P. O'CONNOR, Substituted Defendant,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Summary Statement of Matter Involved.

This case, now that all the questions of local law have been eliminated, raises the question whether the Connecticut Corporation Business Tax Law, which is a tax upon the franchise of a corporation for the privilege of doing business in Connecticut, is in violation of the United States Constitution when it is sought to be applied to the plaintiff, a Missouri trucking corporation, engaged exclusively in interstate commerce.

The action to enjoin the assessment of tax by the defendant State Tax Commissioner and for a declaratory judgment holding that the plaintiff was not liable to pay such franchise tax, was begun in the United States District Court for the District of Connecticut where the court (Smith, *J.*) enjoined the defendant commissioner from collecting the tax on the ground that the act was not intended to apply to the plaintiff for if it were it would be unconstitutional (47 Fed. Supp. 671 (1942)). That decision was reversed by the United States Court of Appeals for the Second Circuit, one judge dissenting (139 Fed. 2d 809 (1943)), on the ground that the act was intended to apply to the plaintiff and was constitutional. On appeal to this court, the case was remanded to the District Court (323 U. S. 101 (1944)) until such time as questions of local law might be decided by the state courts of Connecticut. Accordingly the plaintiff brought an action for declaratory judgment in the Superior Court for Hartford County asking that the Corporation Business Tax Act be held not applicable to it and, if applicable, that it be declared unconstitutional. It also claimed the computation of the tax improper. The Superior Court (Comley, *J.*) held that the act was intended to apply to the plaintiff and was therefore in violation of the United States Constitution (15 Conn. Supp. 205 (1947)). On appeal, the Connecticut Supreme Court of Errors held that the act was applicable to the plaintiff and resolved all questions of local law against the plaintiff. It further held that it imposed "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state whether they be domestic or foreign". The court, however, refused to pass on the federal constitutional questions, holding that in

view of the decision of this court "it is not for us to trench upon its right to decide those (constitutional) issues". (*Spector Motor Service, Inc.* v. *Walsh*, 135 Conn. 37, 41 (1948).)

Thereupon the defendant commissioner moved in the United States District Court of the District of Connecticut for the dissolution of the injunction which Judge Smith had issued in 1942. From Judge Smith's decision refusing to dissolve the injunction (88 Fed. Supp. 711 (1949)), the defendant appealed once more to the United States Court of Appeals for the Second Circuit. The case there was argued before Judges Swan, Clark and Frank. The District Court was again reversed on March 29, 1950, by the opinion of Judges Clark and Frank (who had also heard the earlier appeal). A dissent was filed by Judge Swan "for the reasons stated by the District Judge and by Judge Learned Hand in his dissent on the former appeal". The present petition for certiorari is to seek a review of that action of the Court of Appeals for the Second Circuit.

The facts, in brief, are that the Connecticut Act, the pertinent parts of which are included in the Appendix to this petition, provides that every corporation (with certain exceptions not here material) "carrying on business in this state" shall pay annually "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state" of 2 per cent of the defined net income received "from business transacted within the state during the income year." (Section 418c Cum. Supp. to General Statutes.) By Section 176f effective July 1, 1937, after a portion of the taxes involved in this case had accrued, the tax was made applicable not only to those corporations carrying on business in Connecticut but also to those "having the right to carry on business in this state."

As to those corporations whose trade or business is carried on "partly without the state," Section 420c provides that the tax shall be imposed on a base "which reasonably represents the proportion of the trade or business carried on within the state." Interest, dividends, royalties and net gains from the sale of assets are allocated on the basis of their source. The same section provides that income derived from business other than the manufacture, sale or use of tangible personal or real property shall be allocated within and without the state under regulations of the tax commissioner. However, when income is derived from the manufacture, sale or use of tangible personal or real property, the portion to be attributed to "business within the state" is determined by an allocation fraction which is the simple arithmetical mean of the three following fractions:

(1) $\dfrac{\text{Average monthly fair cash value of taxpayer's tangible property in Connecticut}}{\text{Total average monthly fair cash value of all taxpayer's tangible property}}$

(2) $\dfrac{\text{Wages paid to employees from Connecticut offices}}{\text{Total wages paid all employees of taxpayer}}$

(3) $\dfrac{\text{Gross receipts from transactions chiefly negotiated and executed in Connecticut}}{\text{Taxpayer's total gross receipts (excluding income from interest and dividends or capital gains)}}$

The plaintiff claimed and the trial court found that it was engaged in carrying freight by motor exclusively in interstate commerce chiefly from Chicago and

St. Louis to the eastern seaboard and return and that it picked up and delivered freight in Connecticut but all in interstate commerce and that it had no power to engage in intrastate commerce and in fact at no time has so engaged. The plaintiff is a Missouri corporation with its executive offices in Chicago, Illinois. In Connecticut it maintains two rented depots for the transmission of freight in interstate commerce. It has 27 employees in Connecticut to service those depots but they are paid by draft on the plaintiff in Chicago, where all matters of rating and billing are handled. The plaintiff maintains a bank account in Bridgeport, Connecticut, where collections are deposited but no employee in Connecticut has authority to draw on that account. The plaintiff has no real estate in Connecticut and, apart from a few pick-up trucks, it owns in Connecticut personal property—mostly depot equipment—worth between $1500-$2000.

As the trial court found, the plaintiff, at the request of its landlord, on July 11, 1934, filed with the Secretary of the State of Connecticut a certificate of its incorporation in Missouri and also a certificate appointing the Secretary its attorney for service of process in Connecticut, pursuant to Section 3488, General Statutes of the State of Connecticut. That action, however, conferred no rights on the plaintiff because the plaintiff never was authorized, either by the Interstate Commerce Commission or by the Public Utilities Commission of Connecticut, to conduct an intrastate business. Its only purpose and effect was to subject the plaintiff to personal liability if it should default in its rent.

The defendant state tax commissioner, purporting to act under the Corporation Business Tax Act, assessed the plaintiff for taxes claimed to be due for

the years ending May 31, 1936, May 31, 1937, May 31, 1938, and for the period ending December 31, 1938, and for the years ending December 31, 1939, and December 31, 1940, aggregating the sum of $7,795.50.

The lengthy litigation through which this case has traveled has at least narrowed the issues. The Connecticut Supreme Court of Errors has defined the tax as an excise upon the privilege of doing business in Connecticut. The case now presents an issue which as Judge Learned Hand phrased it in his dissenting opinion is this: May a state levy "an excise directly upon the privilege of carrying on an activity which is neither derived from the state, nor within its power to forbid" (139 Fed. (2d) 809 at page 822).

II.

Statement of Jurisdiction.

That the District Court had jurisdiction of this case under the provisions of the Johnson Act 28 U. S. C. Sec. 1341 was decided by this court in its former opinion wherein it was stated, "The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate despite the Johnson Act and *Great Lakes Dredge Co. v. Huffman*, 319 U. S. 293, because of the uncertainty surrounding the adequacy of the Connecticut remedy" (323 U. S. 101 at page 105). Since that opinion, the Connecticut Supreme Court of Errors in its opinion in this very same case (135 Conn. 37, 61 Atl. (2d) 89) has cleared up the doubt as to the adequacy of the remedy in state courts and held that an action for declaratory judgment or for an injunction would lie in the state

courts. We submit that that opinion, however, does not oust the federal courts of jurisdiction. It was pointed out in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, that where no adequate state remedy was apparent when an action was instituted in the federal courts, federal jurisdiction was not defeated by a later opinion of the state supreme court indicating an available remedy. See also *American Life Insurance Co.* v. *Stewart*, 300 U. S. 203, 215.

Moreover, in this particular case, if the federal courts were to deny themselves jurisdiction, the plaintiff would be without a remedy in any court, because the Connecticut Supreme Court of Errors has specifically refused to decide the only issues left in the case, holding it is for the federal courts to do so. In this particular case, it would seem that even today there is no "plain, speedy and efficient remedy" in the state courts and for that reason alone the United States courts have jurisdiction.

The Court of Appeals acquired jurisdiction by virtue of the defendant's appeal pursuant to the provisions of 28 U. S. C. Sec. 1291. This court has jurisdiction to grant this petition for certiorari and to hear this appeal by virtue of the provisions of 28 U. S. C. Sec. 1254 (1) which authorizes this court, upon petition of a litigant to cause a case to be certified to it from the Court of Appeals for final determination.

The judgment of the Court of Appeals sought to be reviewed was entered on March 29, 1950, and this petition is being filed in the office of the clerk of this court within ninety days of the entry of said judgment as provided for in 28 U. S. C. Sec. 2101(c).

III.

The Questions Presented.

There are two questions which the plaintiff desires to present to this court if certiorari is granted.

1. The first is that the Connecticut Corporation Business Tax Act is unconstitutional because, in violation of the commerce clause of the United States Constitution (Article I, Section 8), it is an attempt by a state to impose an excise upon the right of the plaintiff to engage exclusively in interstate commerce.

2. The second is that the act is unconstitutional because it is in violation of the due process clause of the United States Constitution (Article XIV, Section 1, of the Amendments) as applied to the plaintiff.

In defining net taxable income the statute (419e Cum. Supp. General Statutes) did not allow "rent" to be deducted from gross income. The defendant has held that the cost of hiring trucks (which amounts to 60% of the plaintiff's operating expense) is "rent" and therefore not deductible. As a result, the assessment is not a tax on net income but approaches a tax on gross income in interstate commerce and is therefore unfair, discriminating and in violation of due process.

IV.

Reasons Relied on for the Allowance of the Writ.

When we filed in this court our first petition for certiorari, we did not file an accompanying brief (nor do we now) but relied on the majority and minority opinions in the then Circuit Court of Appeals to demonstrate that this case presented a problem of a type and importance to merit a review by this court. Every reason which induced this court to grant certiorari then is present now. In addition, we have complied with the mandate of this court and have cleared away all local issues leaving only the constitutional problems which can be finally resolved by this court and no other.

This court will recall that the first opinion of the majority of the Court of Appeals recognized that on the basis of decided cases the statute here in question was unconstitutional as the District Court had held. The majority, however, noting what they considered "foreshadowing trends" felt impelled to anticipate the overruling of those decided cases. When this matter, after having been through the state courts, came once more before the District Court, that court, following the decided cases, held again the act to be unconstitutional. On the second appeal to the Court of Appeals, the same two judges again constituting a majority of the court, reversed the trial court stating their position as follows:

> "When we had this case before us six years ago we expressed the view that earlier decisions, of which *Alpha Portland Cement Co.* v. *Common-*

wealth of Massachusetts, 268 U. S. 203, was the principal authority, were against the validity of a state tax levied upon even net income of a corporation engaged solely in interstate commerce. But on examination of the broad trends in favor of the state-taxing power shown by the Supreme Court, we concluded that the *Alpha Portland Cement* case and its progeny were no longer controlling and that as of that date the validity of such a tax as this would be sustained. We are now called upon to re-examine our conclusions to see if, as indeed the learned trial judge thought, later developments show that we were in error.

"Before embarking upon this task, we think it needful that we redefine what we conceive to be our functions as judges of a constitutionally inferior court; for it seems to have been thought in some quarters that our previous attempt to study doctrinal trends as to the fate of state taxation in interstate commerce was only an endeavor to guess the votes of Supreme Court justices. We certainly have no desire either to psychoanalyze or to Gallup-poll the Court and its newer members, nor do we conceive that to be greatly useful to it or to others. We recognize, too, that it would be futile and undignified not to yield obeisance to ancient precedents solely because we personally think they have outlived their usefulness; but it would be equally futile to press them upon the parties when they are no longer more than wraiths."

The problem of six years ago remains unsolved. The majority opinion is still frankly and admittedly in conflict with the applicable decisions of this court.

In addition to the *Alpha Cement* case already cited reference is had to the following:

Ozark Pipe Line Corp. v. *Monier*, 266 U. S. 555;
New York ex rel. v. *Knight*, 192 U. S. 21;
Cooney v. *Mountain States Telephone Co.*, 294 U. S. 384;
Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90;
Anglo-Chilean Nitrate Corp. v. *Alabama*, 288 U. S. 218.

Between the time of the first and second decisions of the Court of Appeals the cases of *Joseph* v. *Carter and Weekes Stevedoring Co.*, 330 U. S. 422, and *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, were decided by this court. These cases seem to us to indicate that this court is acutely conscious of the peril to interstate commerce if the right to engage in it is subject to state taxation. As Judge Hand has pointed out the states have "representation in Congress which the nation has not in their legislatures". It is important therefore that interstate commerce be given by this court its full constitutional protection. So long as the two opinions of the Court of Appeals are the law of this case "a long course of constitutional history and an 'unbroken line of decisions' would indeed be brought into question" *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101 at page 103.

So far as the question of due process is concerned since this case was last before this court it is significant that the Connecticut legislature has amended the statute so that "rent" is a now deductible item. It is a recognition of our position that the statute was unconstitutional. By labeling as "rent" the cost of hiring trucks (which constitutes 60% of Spector's total oper-

ating costs) and then by refusing to allow such "rent" to be deducted from gross income in determining net income, Connecticut subjected the plaintiff substantially to a tax on gross income outlawed by *Gwin* v. *Henneford,* 305 U. S. 434, and cases cited. In fact the impropriety of the assessment was so clear that the defendant without legislative sanction adopted a rule of thumb whereby 60% of the cost of hiring trucks was allowed as an operating expense and thus made deductible. That compromise however only mitigates but does not remove the intrinsic injustice of the defendant's refusal to recognize as an operating expense the cost of hiring trucks from other operators.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of said Court of Appeals be reversed by this Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

PETITIONER,

By CYRIL COLEMAN,
750 Main Street,
Hartford, Conn.,
Its Counsel.

DAY, BERRY & HOWARD,
750 Main Street,
Hartford, Conn.,
Of Counsel.

APPENDIX.

Section 418c, 1935 Supplement to the General Statutes:

Sec. 418c. Imposition of tax. Every mutual savings bank, savings and loan association and building and loan association doing business in this state, and every other corporation or association carrying on business in this state which is required to report to the collector of internal revenue for the district in which such corporation or association has its principal place of business for the purpose of assessment, collection and payment of an income tax, except (1) insurance companies, (2) companies principally engaged in the transportation and communication business and subject to the gross earnings taxes under chapters 70, 71 and 72, (3) companies principally engaged in manufacturing, selling or distributing gas, electricity or water and subject to the gross earnings tax imposed under chapter 73 and (4) companies all of whose properties in this state are operated by companies subject to taxation under chapters 70, 71, 72 and 73, shall pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state, such tax to be measured by the entire net income as herein defined received by such corporation or association from business transacted within the state during the income year and to be assessed at the rate of two per cent; provided in no case shall the tax be less than the minimum tax as computed under section 421c and provided, when any company taxable under chapter 71 shall engage in any business in this state other than the carrying of passengers for hire in common carrier motor vehicles, such company shall

be subject to a tax of two per cent measured by that portion of its total net income derived from such business but shall not be subject to the minimum tax computed under section 421c. Notwithstanding any other provisions of this chapter, any mutual savings bank owning at the end of the income year, real estate acquired for debt having an assessed valuation of ten per cent or more of its total assets shall, during the calendar years 1936 and 1937, be subject to the lesser of (1) the tax imposed by this chapter and (2) the tax imposed by chapter 68 as amended by section 355b of the 1933 supplement.

Section 419c, 1935 Supplement to the General Statutes:

Sec. 419c. Deductions from gross income. In arriving at net income as defined in section 417c whether or not the taxpayer is taxable under the federal corporation net income tax, there shall be deducted from gross income all items deductible under the federal corporation net income tax law effective and in force on the last day of the income year, except (1) federal taxes on income or profits, losses of prior years, interest received from federal, state and local government securities and specific exemptions, if any such deductions shall be allowed by the federal government and (2) interest and rent paid during the income year.

Section 420c, 1935 Supplement to the General Statutes:

Sec. 420c. Allocation of net income. If the trade or business of the taxpayer shall be carried on partly without the state, the business tax shall be imposed on a base which reasonably represents the proportion of the trade or business carried on within the state. The

allocation of the base of the tax measured by net income shall be made on the following basis: (1) Interest, dividends, royalties and gains from sales of intangible assets, less related expenses, when received by a company having its principal place of business within the state, shall be allocated to the state and, when received by a company having its principal place of business without the state, shall be allocated without the state; provided, when it can be clearly established that such income is received in connection with business within the state, such income shall be allocated to the state without regard to the location of the principal place of business of the taxpayer, and a similar rule shall apply to such income received in connection with business without the state; (2) gains from sales or rentals of tangible capital assets held, owned or used in connection with the trade or business of the taxpayer but not for sale or for rent in the regular course of business shall be allocated to the state if the property sold or rented be situated in the state prior to the sale or during the rental thereof, otherwise such gains shall be allocated outside the state; (3) net income of the above classes having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows: (a) Such income, when derived from business other than the manufacture, sale or use of tangible personal or real property, shall be specifically allocated within and without the state under rules and regulations of the tax commissioner; (b) when derived from the manufacture, sale or use of tangible personal or real property, the portion thereof attributable to business within the state shall be determined by means of an allocation fraction to be computed as the simple arithmetical mean of three

fractions. The first of these fractions shall represent that part of the average monthly fair cash value of the total tangible property held and owned by the taxpayer during the income year which is held within the state, without deduction on account of any incumbrance thereon but excluding any property the income of which is separately allocated under the foregoing provisions of this chapter. The second fraction shall represent the part of the total wages, salaries and other compensation to employees paid by the taxpayer during the income year from offices, agencies or places of business within the state, provided all such payments shall be assigned to the office, agency or place of business of the taxpayer at which the employee chiefly works or from which he is sent out or with which he is chiefly connected. The third fraction shall represent the part of the taxpayer's gross receipts from sales or other sources during the income year, excluding any income which is specifically allocated under subdivisions (1) and (2) of this section, which is assignable to offices, agencies or places of business within the state, provided such receipts shall be assigned to that office, agency or place of business at or from which the transactions giving rise thereto are chiefly negotiated and executed.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 132

SPECTOR MOTOR SERVICE, INC., a Corporation,
Appellant,

vs.

CHARLES J. McLAUGHLIN, Tax Commissioner,
DENNIS P. O'CONNOR, Substituted Defendant,
Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPELLANT'S BRIEF.

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THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 132.

SPECTOR MOTOR SERVICE, INC., a Corporation,
Appellant,

vs.

CHARLES J. McLAUGHLIN, Tax Commissioner,
DENNIS P. O'CONNOR, Substituted Defendant,
Appellee.

APPELLANT'S BRIEF.

I.

Opinions of the Lower Courts.

Since this case has been before this court previously (323 U. S. 101) and then remanded so that a declaratory judgment might be obtained in the Connecticut state courts to resolve certain questions of state law, we submit the following chronological list of the opinions of the various courts which have passed on this case:

47 Fed. Supp. 671 (1942);
139 Fed. (2d) 809 (1943);
323 U. S. 101 (1944);
15 Conn. Supp. (Connecticut Superior Court) 205 (1947);
135 Conn. 37, 61 Atl. (2d) 89 (1948);
88 Fed. Supp. 711 (1949);
181 Fed. (2d) 150 (1950).

II.

Statement of Jurisdiction.

That the District Court had jurisdiction of this case under the provisions of the Johnson Act, 28 U. S. C., Sec. 1341, was decided by this court in its former opinion wherein it was stated, "This District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate despite the Johnson Act and *Great Lakes Dredge Co.* v. *Huffman*, 319 U. S. 293, because of the uncertainty surrounding the adequacy of the Connecticut remedy" (323 U. S. 101 at page 105). Since that opinion, the Connecticut Supreme Court of Errors in its opinion in this very same case (135 Conn. 37, 61 Atl. (2d) 89) has cleared up the doubt as to the adequacy of the remedy in state courts and held that an action for declaratory judgment or for an injunction would lie in the state courts. We submit that that opinion, however, does not oust the federal courts of jurisdiction. It was pointed out in *Dawson* v. *Kentucky Distillers Co.*, 255 U. S. 288, that where no adequate state remedy was apparent when an action was instituted in the federal courts, federal jurisdiction was not defeated by a later opinion of the state supreme court indicating an available remedy. See also *American Life Insurance Co.* v. *Stewart*, 300 U. S. 203, 215.

Moreover, in this particular case, if the federal courts were to deny themselves jurisdiction, the plaintiff would be without a remedy in any court, because the Connecticut Supreme Court of Errors has specifically refused to decide the only issues left in the case, holding it is for the federal courts to do so. In

this particular case, it would seem that even today there is no "plain, speedy and efficient remedy" in the state courts and for that reason alone the United States courts have jurisdiction.

The Court of Appeals acquired jurisdiction by virtue of the defendant's appeal pursuant to the provisions of 28 U. S. C., Sec. 1291. This court had jurisdiction to grant plaintiff's petition for certiorari and to hear this appeal by virtue of the provisions of 28 U. S. C., Sec. 1254 (1) which authorizes this court, upon petition of a litigant, to cause a case to be certified to it from the Court of Appeals for final determination.

The judgment of the Court of Appeals sought to be reviewed was entered on March 29, 1950, and the petition for certiorari was filed in the office of the clerk of this court within ninety days of the entry of said judgment as provided for in 28 U. S. C., Sec. 2101c. and granted on October 9, 1950.

III.

Statement of the Case.

This case, now that all the questions of local law have been eliminated, raises the question whether the Connecticut Corporation Business Tax Law (printed in the Appendix) which is a tax upon the franchise of a corporation for the privilege of doing business in Connecticut, is in violation of the United States Constitution when it is sought to be applied to the plaintiff, a Missouri trucking corporation, engaged exclusively in interstate commerce.

The action to enjoin the assessment of tax by the defendant State Tax Commissioner and for a declara-

tory judgment holding that the plaintiff was not liable to pay such franchise tax, was begun in the United States District Court for the District of Connecticut where the court (Smith, *J.*) enjoined the defendant commissioner from collecting the tax on the ground that the act was not intended to apply to the plaintiff for, if it were, it would be unconstitutional (47 Fed. Supp. 671 (1942)). That decision was reversed by the United States Court of Appeals for the Second Circuit, one judge dissenting (139 Fed. 2d 809 (1943)), on the ground that the act was intended to apply to the plaintiff and was constitutional. On appeal to this court, the case was remanded to the District Court (323 U. S. 101 (1944)) until such time as questions of local law might be decided by the state courts of Connecticut. Accordingly, the plaintiff brought an action for declaratory judgment in the Superior Court for Hartford County asking that the Corporation Business Tax Act be held not applicable to it and, if applicable, that it be declared unconstitutional. It also claimed the computation of the tax improper. The Superior Court (Comley, *J.*) held that the act was intended to apply to the plaintiff and was therefore in violation of the United States Constitution (15 Conn. Supp. 205 (1947)). On appeal, the Connecticut Supreme Court of Errors held that the act was applicable to the plaintiff and resolved all questions of local law against the plaintiff. It further held that it imposed "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state whether they be domestic or foreign". The court, however, refused to pass on the federal constitutional questions, holding that in view of the decision of this court "it is not for us to trench upon its right to decide those (constitu-

tional) issues". (*Spector Motor Service, Inc.* v. *Walsh*, 135 Conn. 37, 41 (1948).)

Thereupon the defendant commissioner moved in the United States District Court of the District of Connecticut for the dissolution of the injunction which Judge Smith had issued in 1942. From Judge Smith's decision refusing to dissolve the injunction (88 Fed. Supp. 711 (1949)), the defendant appealed once more to the United States Court of Appeals for the Second Circuit. The case there was argued before Judges Swan, Clark and Frank. The District Court was again reversed (181 Fed. (2d) 150 (1950)), by the opinion of Judges Clark and Frank (who had also heard the earlier appeal). A dissent was filed by Judge Swan "for the reasons stated by the District Judge and by Judge Learned Hand in his dissent on the former appeal". We ask reversal of the decision of the Court of Appeals for the Second Circuit.

As to the facts, the plaintiff is a Missouri corporation formed in 1933 with administrative headquarters in Chicago (R. 100). It is engaged exclusively in hauling freight by motor truck in interstate commerce (R. 101). Its interstate operations extend into the State of Connecticut in that it carries freight into Connecticut from points outside the state and also carries freight from Connecticut to points outside the state (R. 101). It does no intrastate business in Connecticut in fact (R. 102). It operates under permits issued by the Interstate Commerce Commission and by Public Utilities Commission of the State of Connecticut, all of which limit its activities to interstate commerce (R. 102). Its operations are not only interstate but are also interzone, in that it transports

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The symbol R. refers to the Record filed in this court.

freight from Illinois and Missouri to the eastern seaboard and does not serve intermediate states (R. 16), with one exception: by purchase of another carrier, it obtained the right to transport freight in interstate commerce from Illinois to Missouri and vice versa (R. 22). The routes over which the plaintiff's trucks operate within the individual states are prescribed by the Interstate Commerce Commission (R. 16).

The plaintiff has two terminals in Connecticut, one in New Britain and one in Bridgeport, both under lease (R. 101). In connection with the leasing of the New Britain terminal, the landlord insisted that the plaintiff qualify as a foreign corporation and name the Secretary of the State as its agent for service so that it would be subject to the jurisdiction of the Connecticut courts in the event there should be litigation arising out of the leasehold but the plaintiff has never applied for or received authority to operate in intrastate commerce (R. 102).

The plaintiff owns no real estate in Connecticut (R. 27). It owns personal property consisting mostly of office equipment in New Britain and Bridgeport valued at approximately $2,000. It has maintained a bank account at Bridgeport where cash payments received by it from customers might be deposited but no one in Connecticut had authority to draw on that account (R. 27). Payments received by check are placed in an envelope and sent to Chicago (R. 27). Payments received in cash in New Britain are converted into a cashier's check or bank draft and mailed to Chicago (R. 27). There is a petty cash account kept at New Britain. Expenses and salaries are paid by drafts drawn on Chicago (R. 27). At the period in question, there were seventeen employees of the plaintiff at the New Britain terminal and ten at the Bridgeport terminal, all engaged in the actual running of

those terminals (R. 24, 25). The plaintiff has no salesmen as such because as a common carrier it is obligated to serve all but it has two or three representatives at a time, whose business it is to promote the interests of the plaintiff by contacts with the trade and by ironing out whatever difficulties may arise between customer and carrier (R. 28). All the trucks used by the plaintiff are leased from the owners thereof (R. 26). A substantial number of them are leased from Wallace Transport Company, whose stockholders are the same as the stockholders of the plaintiff (R. 30).

The operations of the plaintiff may be described as follows: on receiving a call from a customer desiring to ship a full truck load from New Britain to Chicago, the plaintiff will dispatch a truck to the customer's platform, take on the load and take it directly to the consignee's platform. The freight charges may be prepaid or charged or collected from the consignee. If the load to be transported is less than a truck load, the plaintiff will, instead of dispatching one of its over the road trucks to the customer's platform, send a pick-up truck. This pick-up truck will carry the freight into the local terminal where it will be sorted according to destination, nature of commodity and size of shipment. The pick-up trucks, like the over the road trucks, are leased from their owners but some, which were locally garaged, have been registered in the name of the plaintiff. After sorting, the freight will be loaded on an over the road truck and carried to the terminal in Chicago where the process of sorting is reversed and the freight eventually reaches the consignee's platform from a pick-up truck operating out of the Chicago terminal (R. 36-47).

Under Interstate Commerce regulations, all drivers of trucks used by Spector are considered Spector's

employees and are carried on the payroll as such (R. 64).

On this set of facts, the defendant's predecessor in office, purporting to act under the Corporation Business Tax Act of 1935, as amended, has assessed the plaintiff for taxes claimed to be due for the years ending May 31, 1936, May 31, 1937, May 31, 1938 and for the period ending December 31, 1938 and for the years ending December 31, 1939 and December 31, 1940, totalling $7,795.50 as of January 7, 1942 (R. 103).

IV.

Questions Presented.

This case presents two questions as set forth in our petition for writ of certiorari as follows:

1. The first is that the Connecticut Corporation Business Tax Act is unconstitutional because, in violation of the commerce clause of the United States Constitution (Article I, Section 8), it is an attempt by a state to impose an excise upon the right of the plaintiff to engage exclusively in interstate commerce.

2. The second is that the act is unconstitutional because it is in violation of the due process clause of the United States Constitution (Article XIV, Section 1, of the Amendments) as applied to the plaintiff.

In defining net taxable income the statute (419C Cum. Supp. General Statutes) did not allow "rent" to be deducted from gross income. The defendant

has held that the cost of hiring trucks (which amounts to 60% of the plaintiff's operating expense) is "rent" and therefore not deductible. As a result, the assessment is not a tax on net income but approaches a tax on gross income in interstate commerce and is therefore unfair, discriminating and in violation of due process.

V.

Summary of Argument.

A. The Connecticut Corporation Business Tax Act is unconstitutional because it is in violation of Article I, Section 8, of the Constitution of the United States.

B. The Act is unconstitutional because it is in violation of the due process requirements of Article XIV, Section 1, of the Amendments to the Constitution of the United States as applied to the plaintiff.

C. The plaintiff and the industry are fully taxed.

VI.

Argument.

A.

The Connecticut Corporation Business Tax Act is unconstitutional because it is in violation of Article I, Section 8, of the Constitution of the United States.

This is the eighth time this case has been briefed and argued before a court. The court opinions contained in the record present a mass of argument and

authority which we do not deem it necessary to repeat. While this case is of such importance that it would ordinarily call for a lengthy brief, we do not think it necessary in view of the extended discussions by the lower courts, which are contained in the record, to present to this court a brief which would be merely a repetition of material already before this court.

We may start with two basic assumptions upon which all courts which have reviewed this case have agreed. The first is that Spector Motor Service, Inc. has only the right to engage in interstate and in fact does engage exclusively in interstate commerce. The District Court so found (R. 102) as did the Court of Appeals (R. 110) and the Superior Court and Supreme Court of Errors of Connecticut (R. 146). We do not understand that the defendant seriously disputes that fact. The second assumption which now may be safely made since the opinion in this case by the Supreme Court of Errors, is that the tax in question is not an income tax nor tax upon the privilege of using Connecticut highways but it is "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state whether they be domestic or foreign" (*Spector Motor Service* v. *Walsh*, 135 Conn. 31, 56, see R. 156). Thus is posed the very serious constitutional question as Judge Hand phrased it in the court below: may a state levy "an excise directly upon the privilege of carrying on an activity which is neither derived from the state, nor within its power to forbid" (R. 133). Or as this court in its previous opinion on this case said "If Connecticut, in fact, sought to tax the right to engage in inter-

state commerce, a long course of constitutional history and an 'unbroken line of decisions' would indeed be brought into question" (323 U. S. 101, 103). We submit that the language of this court in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1946) is apropos.

> "The simple but controlling question is whether the state has given anything for which it can ask return."

We, of course, concede that when a state confers a privilege upon a person who is engaged in interstate commerce it may exact a tax upon the privilege granted. In fact, the plaintiff itself pays taxes to the state of Connecticut and its subdivisions for such privileges by means of gasoline taxes, property taxes and the like. But it does not protest against paying a tax to the state of Connecticut upon the privilege of engaging in interstate commerce which that state can neither confer nor take away. Thus, this case is easily distinguishable from those cases which exact a tax in return for some service rendered. We do not question that "interstate commerce must pay its way." Thus it has been held constitutional to tax the operation of interstate buses for the upkeep of the highways used by the buses (*Interstate Busses Corp.* v. *Blodgett*, 238 U. S. 245). Likewise, where a corporation is engaged both in intrastate and interstate commerce, the local business will support a franchise tax measured by income reasonably attributed to intrastate business (*Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113). A property tax may constitutionally be imposed by a state on property physically located within that state although used exclusively in interstate commerce (*Postal Telegraph*

Cable Co. v. *Adams*, 155 U. S. 688). A non-discriminatory net income tax (*Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435) and use and sales taxes affecting such property have been recognized. (See *McGoldrick* v. *Bernind-White Co.*, 309 U. S. 33 (1939), and *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335 (1943).[9] There are many ways in which a state may make interstate commerce pay its way, as pointed out by Chief Justice Hughes in *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384, 392 (1934), but it may not constitutionally tax the right to engage in interstate commerce (*Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (1925), and *Anglo Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218 (1933)). The Connecticut legislature insists on taxing interstate commerce in the one way in which it cannot constitutionally be done.

But where, as here, a state attempts to tax the right to engage in interstate commerce it runs up against a constitutional impediment which has been sustained by an unbroken line of decisions.

> *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 44 A. L. R. 1219;
> *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555;
> *New York ex rel.* v. *Knight*, 192 U. S. 21;
> *Anglo Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218;
> *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384;
> *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90.

The Court of Appeals seems to recognize the distinction between this case, involving a tax on the right to engage in interstate commerce, and those

cases (samples of which we have cited above) where a tax upon a state-granted privilege is involved. It dismissed that distinction however as a "barren one indeed" (R. 119). While recognizing that the cases decided by this court would invalidate the statute in question, the Court of Appeals upheld the statute because foreshadowing "trends" (R. 118), it felt, indicated that this court was about to reverse an unbroken line of decisions. The rationale of the majority of the Court of Appeals is expressed in its first opinion in this language referring to the case of *Alpha Portland Cement Co.* v. *Massachusetts, supra,* which we had claimed to be controlling:

> "When, however, a corporation is engaged within a state solely in interstate commerce, it must be conceded frankly, and this is the basis of the thoughtful conclusion of the court below, that the Supreme Court to date has held it immune from net income taxation by that state. * * * If that were the whole story or if further our duty were limited to picking the closest unoverruled analogy in reported cases and following that blindly and mechanically, we should hold that these cases, and particularly the *Alpha Cement* case, had foreclosed all further discussion. But that is far from the whole story; the trends noted above have gone further in several specific cases fundamentally close to this and in divisions in the Court itself, which are certainly not without significance in forecasting the future course of the law. And our function cannot be limited to a mere blind adherence to precedent. We must determine with the best exercise of our mental powers of which we are capable that law

which in all probability will be applied to these litigants or to others similarly situated."

In its more recent opinion, the same majority reiterated its views as follows:

"When we had this case before us six years ago we expressed the view that earlier decisions, of which *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203, was the principal authority, were against the validity of a state tax levied upon even net income of a corporation engaged solely in interstate commerce. But on examination of the broad trends in favor of the state-taxing power shown by the Supreme Court, we concluded that the *Alpha Portland Cement* case and its progeny were no longer controlling and that as of that date the validity of such a tax as this would be sustained. We are now called upon to re-examine our conclusions to see if, as indeed the learned trial judge thought, later developments show that we were in error.

Before embarking upon this task, we think it needful that we redefine what we conceive to be our functions as judges of a constitutionally inferior court; for it seems to have been thought in some quarters that our previous attempt to study doctrinal trends as to the fate of state taxation in interstate commerce was only an endeavor to guess the votes of Supreme Court justices. We certainly have no desire either to psychoanalyze or to Gallup-poll the Court and its newer members, nor do we conceive that to be greatly useful to it or to others. We recognize, too, that it would be futile and undignified

not to yield obeisance to ancient precedents solely because we personally think they have outlived their usefulness; but it would be equally futile to press them upon the parties when they are no longer more than wraiths."

What the Court of Appeals overlooked, we submit, is the vitality of the principle that the right to engage in interstate commerce may not be taxed even though such commerce may be made to pay its way. Whether one examines majority or minority opinions in recent cases in this court one finds adherence to the principle that a franchise tax of this type is void. In *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542 (1950), Mr. Justice Black, speaking for the majority, said at page 544:

> "Courts have invoked the commerce clause to invalidate state taxes on interstate carriers only upon finding that: (1) the tax discriminated against interstate commerce in favor of intrastate commerce; (2) the tax was imposed on the privilege of doing an interstate business as distinguished from a tax exacting contributions for road construction and maintenance or for administration of road laws; or (3) the amount of the tax exceeded fair compensation to the state."

In *Joseph* v. *Carter and Weekes Stevedoring Co.*, 330 U. S. 422 (1947), Mr. Justice Douglas dissenting said at page 445:

> "Taxes designed to make interstate commerce bear a fair share of the cost of local government from which it receives benefits have been upheld; taxes which discriminate against interstate com-

merce, which impose a levy for the privilege of doing it, or which place an undue burden on it have been invalidated."

What the lower court failed to realize, we submit, is the basis of the constitutional prohibition against a franchise tax of this type. What this court said in the *Joseph* case in explaining why a tax on gross receipts from interstate commerce is apropos to the present case (p. 433).

> "We reaffirm the rule of *Puget Sound Stevedoring Company.* 'What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman* v. *Hewit, supra,* p. 256. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-of-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

It must be remembered also, as Judge Hand has said, that the states have "representation in Congress

which the nation has not in their legislatures" (R. 134) so that interstate commerce stands in need of constitutional protection.

In discussing "doctrinal trends" which the Court of Appeals felt justified its failure to follow the admitted direct precedents, that court cited a number of cases which undoubtedly will be relied on by the appellee. We submit those cited cases do not weaken the principle that a state franchise tax on the right to engage in interstate commerce is invalid. They are merely further examples of cases where interstate commerce is required to pay a tax on a locally granted privilege. For instance, to take the most recent cases cited: *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946) is a *per curiam* decision affirming 27 Calif. (2d) 705, 166 Pac. (2d) 861. It involved an income tax not a tax on the corporation's right to engage in interstate commerce. The Supreme Court of California was well aware of this distinction as the following paragraph from page 863 of the Pacific Reporter shows:

> "'A franchise tax is a tax imposed upon a corporation for the right or privilege of being a corporation or doing business in a corporate capacity' (cases cited). Such a tax is inapplicable to a corporation engaged exclusively in interstate commerce for 'a state may not impose a charge for the enjoyment of a right granted by the federal constitution.' Thus it may not exact a license tax for the privilege of carrying on interstate commerce . . . although it may tax the property used in or the income derived from that commerce so long as the taxes are not discriminatory" (cases cited).

Butler Bros. v. *McColgan*, 315 U. S. 501 (1942) involved a franchise tax on a corporation doing both an interstate and a local business. Likewise *International Harvester Co.* v. *Evatt*, 329 U. S. 416 (1946) and *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U. S. 435 (1944) involved respectively a franchise tax and a privilege dividend tax on a foreign corporation authorized to do business in and having local manufacturing plants in the taxing states. To the same effect is *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940) involving a privilege dividend tax on a chain store corporation. So in *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1947) and in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662 (1949) this court was passing on a statute which the Supreme Court of Mississippi had held imposed a tax in recompense for the protection of the taxpayer's local activities. In *Capitol Greyhound Lines* v. *Brice, supra*, the tax was a property tax on vehicles used in interstate commerce. None of these cases involves a franchise tax on the right to engage in interstate commerce.

Some parts of the opinions of the Court of Appeals make it appear that the court may have misapprehended the nature of the tax in the case at bar. A good section of the first opinion of that court (R. 118-122) is devoted to showing that probably a net income tax levied by a state on a corporation engaged in interstate commerce is valid. When the court came to consider the case on the second appeal, it had the advantage of the opinion of the Supreme Court of Errors. That court specifically held the tax was a tax on the right to engage in business in Connecticut. It rejected the idea that it was an income tax or as the Court of Appeals had suggested a tax in recompense

for the use of Connecticut's highways (R. 156). Nevertheless in its second opinion the Court of Appeals still persisted in speaking of this tax as an income tax. See R. 201 where the Court of Appeals said:

> "Under this test only can substantial question be raised as to the tax before us; but applying it also we conclude that the present tax is valid since it is fundamentally a net income, rather than a gross receipts tax."

At any rate whether or not the majority of the Court of Appeals fell into error because it persisted in construing the tax as an income tax despite the view of the Connecticut Supreme Court of Errors the fact remains that the tax is a franchise tax on the right to engage in interstate commerce.

The Court of Appeals has laid emphasis on the fact that the plaintiff qualified to do business in Connecticut. The District Court found (R. 102) that this was done at the request of plaintiff's Connecticut landlord in order to make plaintiff subject to the jurisdiction of the Connecticut courts in case of disagreement over the lease. There is no dispute that the plaintiff can not legally and in fact does not engage in any but interstate commerce (R. 102). This, the Court of Appeals says (R. 120), is due to the plaintiff's failure merely to comply with "regulations . . . of a police nature". It ignores the fact that the limitations upon the plaintiff's activities confining them to interstate commerce are fixed by the Interstate Commerce Commission as well as by the Public Utility Commission of Connecticut (R. 102). The order of the Interstate Commerce Commission under which plaintiff operates even fixes the plaintiff's routes and limits the plaintiff not only to interstate commerce but even

confines it to interzone commerce (R. 16-19). The permit issued by the Public Utility Commission is for interstate commerce only (R. 10).

Under these circumstances the plaintiff's qualification in Connecticut conferred no rights. It only subjected the plaintiff to the burden of being subject to the jurisdiction of the Connecticut courts. Accordingly, we submit that such qualification is not sufficient to confer upon Connecticut a right to impose the franchise tax in question.

Ozark Pipe Line Corp. v. *Monier, supra;*
Anglo Chilean Corp. v. *Alamaba, supra.*

There is nothing in *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334 and *Flint* v. *Stone Tracey Co.*, 220 U. S. 107 to the contrary. The *Michigan* case involved the question whether a receiver actually operating a domestic corporation was subject to a state franchise tax to which the corporation, if not in receivership, would have been. It was held that the receiver was liable.

In the *Flint* case the question was the power of the federal government to tax businesses operating under franchises issued by the state governments—a power which springs from the Constitutional grant of taxing powers to the federal government and has no connection with the commerce clause. Besides, this court held in that case that the tax "is imposed not upon the franchises of the corporation irrespective of their use in business nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof" (p. 145).

On reason and authority we submit the statute here in question to be unconstitutional as being in violation of the commerce clause.

B.

The Act is unconstitutional because it is in violation of the due process requirements of Article XIV, Section 1, of the Amendments to the Constitution of the United States as applied to the plaintiff.

As we have seen, the Connecticut Supreme Court of Errors has held the tax in question to be a tax upon the plaintiff's right to do business in Connecticut. Necessarily, such a tax is discriminatory when applied to the plaintiff. It burdens interstate commerce without conferring any benefits, whereas intrastate corporate operators secure a genuine privilege in exchange for the tax. In that sense, the statute discriminates against foreign corporations like the plaintiff in a manner not only offensive to the commerce clause but also to the due process clause.

In another particular, the statute as applied to the plaintiff is in violation of due process. The plaintiff owns no trucks except, as it may be said, for a few pick-up trucks which are registered in its name (R. 25, 26). It obtains the trucks needed in its business from owners, by contract. Obviously payments made to such owners by the plaintiff are its greatest single item of expense. The accountant, Mr. Arnold (R. 61, 62), testified that this item of purchased transportation (as it is called under Interstate Commerce Commission accounting practice) amounts to approximately 60% of the total expense of Spector Motor Service. The statute did not allow "rent" as a deduction. The defendant construes this item of purchased transportation to be "rent". Certainly under these circumstances the defendant's refusal to allow this

large operating expense to be deducted makes this assessment no longer a tax on net income but approaches a tax on gross income from interstate commerce. Such taxation, standing alone, has been repeatedly and recently condemned by this court (*Gwin* v. *Henneford*, 305 U. S. 434, and cases cited; *Joseph* v. *Carter and Weekes Stevedoring Co., supra*).

Exhibit 15, as explained by Mr. Arnold (R. 53-56), shows the essential unfairness of the tax as computed by the defendant. If all the other states through which the plaintiff operates imposed a similar tax, a total tax of $5,339.76 would have been payable out of a net income of $111.39 for the last seven months of 1938; out of a net income of $46,064.34 for the year 1939 the tax payable would be $15,442.91; and out of net income of $10,505.86 for the year 1940 the tax would be $20,495.86. The net income above mentioned is net income for federal income tax purposes. If such a tax were upheld, its burden on interstate commerce is at once apparent. The demands made by the state do not represent all that can be demanded if the tax is approved. What one state can do all can do. Thus a local business would be affected but little, whereas interstate commerce would feel the full effect of a tax enforced in many states in such a way as to cripple the interstate business. Further in still another particular, Exhibit 15 illustrates perfectly that this type of taxation is a destructive burden on interstate commerce in that it appears from that exhibit that the tax increases proportionately with the gross income but has no relation to the net income. In 1940 with a gross income of $1,723,510.65 and a net of $10,505.86 the tax is $20,495.86. In 1939 with a gross income of $1,202,210.35 and a net of $46,064.34 the tax is $15,442.91, and in 1938 (seven months) with

a gross income of $432,087.39 and a net of $111.39 the tax is $5,339.76.

For these reasons, the assessment is unfair and inequitable and a violation of due process.

It is significant that since this litigation began, the Connecticut legislature has amended the act so that now "rent" is a deductible item. (See Section 1898, Conn. General Statutes, Revision of 1949.)

It is also significant that without legislative sanction, the State Tax Department had adopted as a rule of thumb, a policy of allowing 60% of the cost of purchased transportation as an operating expense and disallowing the remaining 40% (R. 103). Obviously, it was felt by the department that the cost of purchased transportation was not rent and that some compromise should be adopted. It appears from the testimony of Mr. Steege, Director of the Corporation Division of the State Tax Department (R. 75-80), that the department on the basis of experience of contract carriers estimated that of the cost of hiring trucks 60% could fairly be considered as an operating expense and 40% representing the value of the use of the vehicle. But the payments here made are not solely for the "use of the vehicle," but represent the cost of operating the vehicle. If reasonable with respect to contract carriers, which is improbable, it is not fair in the present case and the District Court so found (R. 103). As Exhibit 16 shows, every cent paid by the plaintiff to its chief lessor, Wallace Transport Co., is used by the company for operating expenses. Exhibit 16 breaks down the operating expenses of Wallace, so that it is obvious that none of the revenue received by Wallace is in reality "rent." If Spector owned the trucks, every penny now paid to Wallace would be used by Spector to operate those

trucks. So that the 60-40 allocation adopted by the department is not equitable so far as this plaintiff is concerned. If taxable at all, it is entitled to a deduction of one hundred per cent of the cost purchased transportation.

Moreover, as pointed out by Mr. Fisher (R. 80-84), an allocation suitable for contract carriers or short-haul carriers, is not fair to long-haul carriers like the plaintiff. Yet it was admitted by Mr. Steege that his figures come from contract carriers (R. 76-78) and this is confirmed by Mr. Fisher (R. 81).

Accordingly, there is ample evidence to support the District Court's finding that the rule of thumb, applied by the defendant in this case, was not based on any analysis of the plaintiff's records (R. 103) but was based on the experience of other carriers whose methods of operations varied so from the plaintiff's as to make no fair comparison between them possible (R. 103). It follows that the action of the defendant in allowing a deduction of only 60% of the cost of purchased transportation cannot stand, in the face of the showing made by the plaintiff.

For all these reasons, we submit the assessments are unfair and discriminatory and a violation of due process.

C.

The plaintiff and the industry are fully taxed.

At this point may we say that large sections of the defendant's previous briefs were devoted to an attack on the plaintiff because it does not pay as much taxes to various governmental units as the defendant feels it should. The Court of Appeals has given weight to

this argument (R. 123). While this attack may have no great legal significance, we think it important enough to spend enough time on it to demonstrate that it is unsound and not based on fact. The claim, in part, seems to be that if there are two possible methods of doing business, the one which calls for the maximum imposition of taxes is the only one which is morally correct. As we read the briefs, there was no claim that there has been any illegal evasion of justly due taxes by the plaintiff. Rather the claim seems to arise out of an ethical concept that one is obligated to pay the sovereign not only the taxes which the statute says one must but also an added sum if by conducting one's business in an inefficient and uneconomical manner one might have become subject to an additional tax.

Further, the defendant's briefs have been completely in error in saying that the plaintiff "has avoided paying corporation taxes to any state where it transacts business". The record shows that the plaintiff pays franchise taxes as required in Missouri, where it is incorporated, and Illinois, where it has its administrative headquarters, and that it pays a myriad of taxes to the states through which it operates as well as to the Federal Government. Apparently the defendant objects because the states do not assess as much taxes against the plaintiff as they constitutionally might. We doubt if this type of argument will be helpful to the court in deciding the constitutionality of the statute here in question.

As a matter of fact, the "comparative immunity from taxation" which the majority opinion of the Court of Appeals spoke of proves to be non-existent when we consult the reports compiled by the Interstate Commerce Commission for the years 1939 to 1942 when the taxes here in question were assessed.

The following table reprinted from our last brief in this court is designed to show the plaintiff's net profit experience as compared to the industry in general. From this table, it may be seen that the industry could no more stand the Connecticut tax burden than could the plaintiff.

(Figures taken from Interstate Commerce Commission reports for the years mentioned on "Statistics of Class I Motor Carriers of Property Engaged Preponderantly in Intercity Service.")

National Statistics

Year	Operating Income	Operating Expenses	Net Operating Revenues	% Net to Gross
1942	$587,869,636	$556,472,133	$31,397,503	5.5%
1941	560,166,612	533,232,281	26,934,331	4.8%
1940	431,052,674	412,040,349	19,012,325	4.4%
1939	378,473,829	359,784,771	14,894,134	3.9%

I. C. C. Statistics for Spector Motor Service, Inc.

Year	Operating Income	Operating Expenses	Net Operating Revenues	% Net to Gross
1942	$2,384,802	$2,416,644	$31,842(D)	1.3% (D)
1941	2,478,984	2,434,068	44,916	1.8%
1940	1,724,955	1,712,804	12,151	0.7%
1939	1,204,590	1,157,962	46,580	3.8%

The following table shows the tax burden upon Class I Motor Carriers of Property with comparative figures for Motor Carriers of Passengers and for Class I Railroads, wherein it appears that, contrary to the intimation of the majority opinion, the motor carrier industry is bearing more than its fair share of taxation.

(Figures taken from Interstate Commerce Commission reports for the years mentioned on Class I Motor Carriers and Class I Railroads.)

Year	Operating Income	Net Operating Revenue	Operating Taxes	% of Taxes to Gross	% of Taxes to Net
(Motor carriers of Property, omitting 000)					*
1942	$587,869	$31,397	$40,100	6.8%	130.%
1941	560,166	26,934	40,231	7.1%	150.%
1940	431,052	19,012	31,503	7.3%	160.%
1939	378,473	14,894	26,636	7.0%	180.%
(Motor carriers of Passengers, omitting 000)					
1942	$251,192	$86,727	$18,722	7.4%	23.%
1941	148,876	28,955	14,134	9.5%	43.%
1940	114,741	16,267	11,606	10.1%	72.%
1939	113,458	18,821	11,456	10.1%	63.%

(Interstate Commerce Commission statistics for Class I Railroads, omitting 000)

Year	Operating Income	Net Operating Revenue	Operating Taxes	% of Taxes to Gross	% of Taxes to Net
1942	$7,465,822	$2,864,739	$248,230	3.3%	8.8%
1941	5,346,699	1,682,467	223,937	4.1%	13.9%
1940	4,296,600	1,207,183	214,914	5.0%	17.9%
1939	3,995,004	1,006,794	236,946	5.9%	26.3%

* This column interpolated.

CONCLUSION.

For the foregoing reasons the plaintiff prays that the judgment of the United States Court of Appeals be reversed and the judgment of the District Court be affirmed.

Respectfully submitted,

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APPENDIX.

Section 418c, 1935 Supplement to the General Statutes:

Sec. 418c. Imposition of tax. Every mutual savings bank, savings and loan association and building and loan association doing business in this state, and every other corporation or association carrying on business in this state which is required to report to the collector of internal revenue for the district in which such corporation or association has its principal place of business for the purpose of assessment, collection and payment of an income tax, except (1) insurance companies, (2) companies principally engaged in the transportation and communication business and subject to the gross earnings taxes under chapters 70, 71 and 72, (3) companies principally engaged in manufacturing, selling or distributing gas, electricity or water and subject to the gross earnings tax imposed under chapter 73 and (4) companies all of whose properties in this state are operated by companies subject to taxation under chapters 70, 71, 72 and 73, shall pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state, such tax to be measured by the entire net income as herein defined received by such corporation or association from business transacted within the state during the income year and to be assessed at the rate of two per cent; provided in no case shall the tax be less than the minimum tax as computed under section 421c and provided, when any company taxable under chapter 71 shall engage in any business in this state other than the carrying of passengers for hire in common carrier motor vehicles, such company shall

be subject to a tax of two per cent measured by that portion of its total net income derived from such business but shall not be subject to the minimum tax computed under section 421c. Notwithstanding any other provisions of this chapter, any mutual savings bank owning at the end of the income year, real estate acquired for debt having an assessed valuation of ten per cent or more of its total assets shall, during the calendar years 1936 and 1937, be subject to the lesser of (1) the tax imposed by this chapter and (2) the tax imposed by chapter 68 as amended by section 355b of the 1933 supplement.

Section 419c, 1935 Supplement to the General Statutes:

Sec. 419c. Deductions from gross income. In arriving at net income as defined in section 417c whether or not the taxpayer is taxable under the federal corporation net income tax, there shall be deducted from gross income all items deductible under the federal corporation net income tax law effective and in force on the last day of the income year, except (1) federal taxes on income or profits, losses of prior years, interest received from federal, state and local government securities and specific exemptions, if any such deductions shall be allowed by the federal government and (2) interest and rent paid during the income year.

Section 420c, 1935 Supplement to the General Statutes:

Sec. 420c. Allocation of net income. If the trade or business of the taxpayer shall be carried on partly without the state, the business tax shall be imposed on a base which reasonably represents the proportion of the trade or business carried on within the state. The

allocation of the base of the tax measured by net income shall be made on the following basis: (1) Interest, dividends, royalties and gains from sales of intangible assets, less related expenses, when received by a company having its principal place of business within the state, shall be allocated to the state and, when received by a company having its principal place of business without the state, shall be allocated without the state; provided, when it can be clearly established that such income is received in connection with business within the state, such income shall be allocated to the state without regard to the location of the principal place of business of the taxpayer, and a similar rule shall apply to such income received in connection with business without the state; (2) gains from sales or rentals of tangible capital assets held, owned or used in connection with the trade or business of the taxpayer but not for sale or for rent in the regular course of business shall be allocated to the state if the property sold or rented be situated in the state prior to the sale or during the rental thereof, otherwise such gains shall be allocated outside the state; (3) net income of the above classes having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows: (a) Such income, when derived from business other than the manufacture, sale or use of tangible personal or real property, shall be specifically allocated within and without the state under rules and regulations of the tax commissioner; (b) when derived from the manufacture, sale or use of tangible personal or real property, the portion thereof attributable to business within the state shall be determined by means of an allocation fraction to be computed as the simple arithmetical mean of three

fractions. The first of these fractions shall represent that part of the average monthly fair cash value of the total tangible property held and owned by the taxpayer during the income year which is held within the state, without deduction on account of any incumbrance thereon but excluding any property the income of which is separately allocated under the foregoing provisions of this chapter. The second fraction shall represent the part of the total wages, salaries and other compensation to employees paid by the taxpayer during the income year from offices, agencies or places of business within the state, provided all such payments shall be assigned to the office, agency or place of business of the taxpayer at which the employee chiefly works, or from which he is sent out or with which he is chiefly connected. The third fraction shall represent the part of the taxpayer's gross receipts from sales or other sources during the income year, excluding any income which is specifically allocated under subdivisions (1) and (2) of this section, which is assignable to offices, agencies or places of business within the state, provided such receipts shall be assigned to that office, agency or place of business at or from which the transactions giving rise thereto are chiefly negotiated and executed.

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No. 132

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

SPECTOR MOTOR SERVICE, INC.,
Petitioner,

v.

CHARLES J. McLAUGHLIN, TAX COMMISSIONER,
DENNIS P. O'CONNOR, TAX COMMISSIONER,
SUBSTITUTED DEFENDANT,
Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinion Below and Previous Opinions

The petition for certiorari was granted from the judgment of the United States Circuit Court of Appeals (Second Circuit) dated March 29, 1950, reported in 181 Fed. (2nd) 150.

This is the second time this case has come before this Court, the previous opinion being reported in 323 U. S. 101.

The first judgment in this case was rendered by the United States District Court (Conn.) in 47 F. Supp. 671. This judgment was reversed by the Circuit Court of Appeals in 139 Fed. (2nd) 809.

After the previous opinion in this Court, an action was brought in the Connecticut courts which resulted in an opinion of the Supreme Court of Errors (Conn.) reported in 135 Conn. 37.

Later, a motion was made to dissolve the injunction issued by the United States District Court (Conn.) and this was denied (88 F. Supp. 711). The Circuit Court of Appeals reversed the District Court in its judgment of March 29, 1950.

Jurisdiction

This Court granted certiorari on October 9, 1950, by virtue of the provisions of 28 U. S. C. Sec. 1291.

Statutes Involved

The taxing statutes involved in this case are Sec. 418c, 1935 Supp. to the General Statutes of Connecticut, amended in 1937 by adding the words "or having the right to carry on" business (Sec. 255d, 1937 Supp.); Sec. 419c, 420c. These sections are reproduced in Appendix A of this brief.

Question Presented

Does Connecticut have the right to levy a corporation business tax on the petitioner, which is a Missouri corporation engaged in the motor transport business, having terminals and trucks located in Connecticut and doing a major portion of its business in Connecticut?

Facts

The Spector Motor Service, Inc. (hereinafter called Spector Company) was incorporated in June, 1933 as a Missouri corporation, having its principal office in St. Louis. It engaged in the motor carrier business by virtue of an Interstate Commerce Commission permit, hauling goods from St. Louis to New York. Recognizing the advantages of a two-way haul, the Spector Company pioneered this movement. Whereas formerly trucks returned from the East empty or laid over for a period of time, the two-way haul insured a return load as quickly as possible. To accomplish this, terminals were established in the East whereby less than truckload deliveries were consolidated,

sorted and arranged so that a full truckload delivery was made on the return trip to the West.

Terminals were established in New Britain, Connecticut (1933) and in Bridgeport, Connecticut (1934-5). These were leased terminals, operated under a lease of three to five years and on a month to month lease, respectively. Rent of $300 to $350 and $325 per month was respectively paid. Other terminals were established in New York, N. Y., Chicago, Ill., Boston, Springfield and Worcester, Mass., Saylesville, R. I., Newark, N. J. and St. Louis, Mo. The terminals other than those in Connecticut and New York, which were leased terminals and used solely by the Spector Company, are agency terminals, i.e., the terminal facilities of other carriers were utilized.

Upon the opening of the terminal in New Britain in 1933, the Spector Company registered with the Secretary of the State of Connecticut as a foreign corporation doing business in the State of Connecticut and paid the statutory fee, and has continued to do so each year since that time.

The terminals were and are operated as points of origin and destination of freight. Shipments picked up at Connecticut factories by either Spector Company trucks or owner-operator trucks hired by the Spector Company, carry the goods to the terminals where the goods are sorted, consolidated, loaded onto trucks and dispatched out of the State. The terminals also were used as points of unloading and distribution. Five trucks owned by the Spector Company, registered with Connecticut license plates, were used as pick-up trucks in the State of Connecticut, never leaving the confines of the State.

Seventeen employees operated the New Britain terminal and handled the freight originating at and destined to that point. The staff included bookkeepers, a general manager and a sales solicitor. Ten employees operated the Bridgeport terminal. Accounts receivable for all New England, fifty percent

of which were prepaid, were collected at the New Britain terminal. The New Britain employees' payroll amounted to $1,200 per week. They were paid by draft on a Chicago bank, which drafts were drawn, issued and delivered at New Britain. A bank account was kept at Bridgeport, Connecticut, for the deposit of collections made by drivers. Some incidental bills were paid by the New Britain office. Local personal property taxes were paid in New Britain on property valued at $1,500 by the Spector Company. The Bridgeport equipment was valued by the Spector Company at $500.

The Spector Company operated a fleet of about one hundred fifty trucks, almost all of which are owned by The Wallace Transport Company, an Illinois corporation, which leased them to the Spector Company. The Spector Company made application to and received tires from the New Britain branch of the Office of Price Administration. Contracts were also made with local truckers to pick up goods at Connecticut factories and deliver the same to the Connecticut terminals.

From 1936 through 1940 the following percentage and amount of the gross business of the Spector Company originated in, was attributable to, and was derived from the State of Connecticut:

1936—47% or $111,709.97 of a total business of $233,787.78.

1937—37.86% or $166,610.06 of a total business of $440,025.92.

1938 (1st 5 mos.)—47% or $150,296.95 of a total business of $318,786.85.

1938 (7 mos.)—50% plus or $218,471.73 of a total business of $432,087.39.

1939—42% or $505,777.47 of a total business of $1,202,210.35.

1940—34% or $587,973.59 of a total business of $1,723,510.65.

The Connecticut Corporation Tax is designated as a fran-

chise tax measured by net income for the use of tangible personal property and real estate in the State. The Tax Commissioner assessed a tax against the Spector Company on the business done by the company within the State and the income derived from the State. The United States District Court rendered judgment for the Spector Company restraining the Tax Commissioner from assessing and collecting the tax, ruling that the tax was a burden on interstate commerce. The Court found that since the Spector Company was engaged solely in interstate commerce, it consequently could not be subjected to the tax unless it could be shown that some intrastate business was done by the Company.

An appeal was taken to the Circuit Court of Appeals for the Second Circuit, which Court after hearing reversed the District Court by judgment entered January 20, 1944, and ordered judgment for the defendants on the merits, holding that the trend of decisions on state tax cases attacked under the Commerce Clause made it apparent that the Supreme Court would uphold such a tax as the instant one applied to the plaintiff, that it was intended to apply to the plaintiff, and, as so applied, not in violation of the state or federal constitutions. The Court stressed the fairness of the method of allocation of the tax to income derived from business originating within the state and concluded that the Supreme Court would look beyond the formal classification of the tax as one upon the privilege of doing an interstate business, and upheld it as a fair charge upon the taxpayer for the state's services to it. 139 F. 2nd 809.

The Supreme Court granted certiorari, 322 U. S. 720, and by mandate dated January 7, 1945, vacated the judgment of the Circuit Court of Appeals and remanded the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought in the state court in conformity with the opinion of the Supreme Court dated December 4, 1944, holding that the federal courts should defer

determination of the constitutionality of the state tax until the state courts had an opportunity to determine the application and constitutionality of the act as applied to the plaintiff under local law. 323 U. S. 101.

Following the decision of the United States Supreme Court, an action for declaratory judgment was brought in the Superior Court for Hartford County, Connecticut, dated December 21, 1944, from the judgment of which Court (August 14, 1947) an appeal was taken to the Supreme Court of Errors of the State of Connecticut.

The Supreme Court of Errors, by its decision undertook to answer the questions as to the interpretation of the Act posed by the opinion of the Supreme Court of the United States in this action. 135 Conn. 37.

Thereafter, on February 11, 1949, the defendant moved in the District Court for dissolution of the injunction entered in said Court on December 21, 1942. It was decided by the parties that no further evidence would be submitted.

The District Court denied the motion on November 1, 1949 and on appeal, the Circuit Court reversed the District Court on March 29, 1950 and ordered the injunction dissolved.

SUMMARY OF ARGUMENT

I. The effect of the decision by the Connecticut Supreme Court of Errors.

II. The effect of registering with the Secretary of State for the purpose of doing business in the State of Connecticut.

III. The Spector Company does not carry its share of the Connecticut tax burden nor that of any other state.

IV. The tax, though labeled a franchise tax, is really a tax on the use of tangible personal property and real estate in the State of Connecticut, and is constitutional.

V. The judgment of the Circuit Court of Appeals should be sustained.

ARGUMENT

I

The effect of the decision by the Connecticut Supreme Court of Errors.

When this case was before the United States Supreme Court on the previous occasion (323 U. S. 101), the cause was remanded to the District Court with directions to retain the bill pending determination of proceedings to be brought in the State courts, for the purpose of testing the validity of the tax laws involved under the Connecticut Constitution, and to decide from what aspect of interstate business Connecticut seeks an exaction. An action for a declaratory judgment was thereafter brought in the Connecticut courts.

Spector Motor Service, Inc. v. *Walsh*, 135 Conn. 37.

The following conclusions were reached in that opinion, viz:

(a) The business of The Spector Company was within the purview of the Connecticut Business Tax Act in question in this case. (Page 50 of the opinion).

(b) It was the intent of the legislature, in passing the taxing statutes here in question, to levy an excise tax on both domestic and foreign corporations which is based on the amount of business attributed to their activities in Connecticut. (Page 55).

(c) The tax commissions (1911, 1933), which considered and recommended the passage of these tax laws, were fully aware of the constitutional prohibition to tax directly the receipts from interstate commerce. They sought to overcome this obstacle by limiting the tax to a reasonable percentage of the proportionate amount of business attributable to the activities of the taxpayer in Connecticut. The use by the legislature of net income instead of gross income (as recommended by the

tax commission) as a base, did not change the essential characteristics of this tax. (Page 53).

(d) As regards a corporation doing business both within and without the State, the intention was, by the use of the allocation fraction formula, to measure the tax by determining as fairly as possible the volume of its business which originates in Connecticut. (Page 57).

(e) The tax in question was intended to impose upon each corporation a share of the general tax burden as nearly as possible equivalent to that borne by other wealth in the State of Connecticut. (Page 56).

(f) The taxing statutes, as they apply to The Spector Company, do not violate any provisions of the Connecticut Constitution. (Page 68).

(g) The Tax Commissioner followed the correct procedure in assessing the taxes against The Spector Company. (Page 70).

(h) The taxing statutes apply to The Spector Company because its income is derived from the use of personal property and real estate in the State of Connecticut. (Page 70).

(i) The Tax Commissioner's action in permitting a deduction of only 60% of the sums paid by The Spector Company for the hire of its trucks as expenses not included in "rent," was correct in the absence of convincing evidence that this was unfair. (Page 69).

(j) No decision is rendered whether the acts in question violate the federal constitution because that matter is still before the federal courts for decision. (Page 70).

These conclusions are now binding on the parties and the question is narrowed as to whether Connecticut is attempting to impose an undue burden on interstate commerce through the medium of a corporation business tax act.

II

The effect of registering with the Secretary of State for the purpose of doing business in the State of Connecticut.

Connecticut seeks to collect taxes for the years ending 1936 to 1940, inclusive. The 1933 act (Sec. 418c) governs the validity of the assessment for the years ending May 31, 1936 ($618.36) and May 31, 1937 ($937.98). See par. 12 complaint rec. reprint 4.

As of June 11, 1937 this Act was amended to include a tax not only on corporations carrying on business in the State, but also on corporations "having the right to carry on business in this state." (Sec. 255d, 1937 Supp. to General Statutes). All the assessments subsequent to May 31, 1937 which are involved in this case are governed by the amended statute.

It is admitted that The Spector Company qualified to do business in the State of Connecticut on June 11, 1934 by filing the necessary papers with the Secretary of State. (Plaintiff's Exhibit I).

The plaintiff attempts to avoid the effect of this statute (Sec. 255d) by claiming that the application to do business was only filed to satisfy the lessor of property which it leased in Connecticut, and for no other purpose; that it could not do business in the State without a permit from the State Public Utilities Commission, which it purposely never obtained; and that in fact, it never did an intrastate business.

This Court has held that the qualification of a corporation by the Secretary of State, to do business (a right solely within the province of the State to grant) is sufficient to sustain a franchise tax even though no intrastate business was actually transacted.

Michigan v. *Michigan Trust Co.*, 286 U. S. 334.
Flint v. *Stone Tracy Company*, 220 U. S. 107.

See also dissenting opinion of Cardozo, J., Brandeis, J., Stone, J., in the case of

Anglo-Chilean Nitrate Sales Corp. v. *Alabama*, 288 U. S. 218.

The necessity of a permit from the Public Utilities Commission stems from the police power of the State (Chap. 265, Rev. 1949) and could have been obtained at any time by the plaintiff. The plaintiff was very desirous of establishing a terminal in New Britain, Connecticut. The location sought could not be obtained without the qualification to do business. Such a qualification enabled the petitioner to use the courts of the State of Connecticut to sue and be sued. (Sec. 5246 to 5256, Rev. 1949). It sought these rights, not as rights belonging to interstate commerce, but as rights common to all corporations carrying on both intrastate and interstate business. Why should it not pay its fair share of tax for the aid given it by Connecticut to establish its terminal in New Britain?

The fact that petitioner had to also comply with a police regulation does not detract from the valuable rights obtained by the qualification to do business, any more than the duty of plaintiff to obey the traffic laws or excessive loading laws of the State.

It is undeniable that the plaintiff did use tangible personal property and real estate in this State, and because it qualified to do business in the State the assessments after May 31, 1937 should be sustained.

III

The Spector Company does not carry its share of the Connecticut tax burden nor that of any other State.

The result intended to be accomplished by the Commerce

Clause of the Federal Constitution is to prohibit the various states of the Union from placing an unwarranted burden, including a tax burden, on the right to carry on trade or business between one state and another. If the tax (burden) is not directed against interstate commerce as such, and if it is not discriminatory, and is fairly levied against all in the same class, this Court has on many occasions said that the tax is constitutional. Those engaged in interstate commerce must pay their just share of the tax burden of the State.

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250.
Postal Telegraph Co. v. *Richmond*, 249 U. S. 252.
McGoldrick v. *Berwind-White Coal Co.*, 309 U. S. 33.
General Trading Co. v. *State Tax Comm.*, 322 U. S. 335.
Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113.
Butler Bros. v. *McColgan*, 315 U. S. 501.
Matson Nav. Co. v. *State Board*, 297 U. S. 441.
U. S. Glue Co. v. *Oak Creek*, 247 U. S. 321.

Connecticut is not attempting to levy a tax on The Spector Company because it is engaging in interstate commerce. The tax is levied because the plaintiff saw fit to make use of tangible personal property and real estate in Connecticut. If the plaintiff did not establish terminals in Connecticut and use its pickup trucks and its scales and other equipment located in the terminals, for the purpose of obtaining business in this State, the tax would not apply to it. There is no tax on the right of The Spector Company to travel through the State with its trucks and trailers.

The Commerce Clause should not be used by a company as a loophole to avoid its fair burden of a tax in a State where it is carrying on an extensive business. The record shows that the plaintiff derived a very large part of its business in Con-

necticut through the use of its terminals. In the statement of facts, supra, we point out that during the years in question, the amount of its business originating in Connecticut was as follows:

	Total Receipts
47% in 1936 out of	$ 233,787.78
37.86% in 1937 out of	440,025.92
About 48.5% in 1938 out of	750,874.24
42% in 1939 out of	1,202,210.35
34% in 1940 out of	1,723,510.65

Through the simple device of creating The Wallace Transport Company under the laws of the State of Illinois, The Spector Company, during these years, paid only the following annual corporation taxes to the various states in which it operated, viz:

$75 to Illinois
$75 to Missouri
$50 to Connecticut

Occupancy tax to New York, the amount of which is not stated in the record, but which was evidently nominal in character. (Rec. reprint 65, 66)

Of course the plaintiff had to pay various state unemployment taxes (which are not corporation taxes) and a net income tax to Missouri, but by using The Wallace Transport Company as a lessor of its trucks, the plaintiff was able to deduct rent payments for this equipment from its income, thus showing nominal net profits from its operations. In that way income taxes to Missouri were reduced to the vanishing point.

The Wallace Transport Company was evidently solely a tax saving device because, by incorporating this company in Illinois, a great saving was effected in the tax on registration plates. They were able to use the T plates at a cost of $36. per truck per year as against $250. per year if this corporation was not organized and plaintiff had to use the X plates. On the

basis of 150 trucks used in its operations, a saving of $32,100. per year in registration fees alone was effected. (Rec. reprint 31)

We do not deny the right of the plaintiff to use all legitimate means to save taxes, but when the plaintiff claims that Connecticut is attempting to put it out of business by levying a terribly harsh tax on its right to engage in interstate commerce, then we say that this company is paying practically no taxes anywhere for its right to engage in business in a corporate capacity; that the railroads with whom plaintiff competes pay their fair share of the tax burdens of the states through which they pass; that the Commerce Clause was not intended to shield the plaintiff from carrying its fair share of such tax burden; that the use of pickup trucks and terminals in Connecticut distinguishes the operations of this company from those in other states through which its trucks merely pass; and that the plaintiff has shown no equity in its favor.

That the tax was reasonable, fair and not discriminatory cannot be disputed in view of the conclusions reached on these subjects by the Connecticut Supreme Court of Errors.

Also, Exhibit 14 shows how small the Connecticut tax is (not including penalties and interest) compared to the business obtained in the State through the use of the pickup trucks and terminals, viz:

Period	Gross Business Originating in Connecticut	Amount of Tax
Year ending May 31, 1936	$ 111,709.97	618.36
Year ending May 31, 1937	166,610.06	937.98
Jan. 1—May 31, 1938	150,296.95	1,113.56
June 1—Dec. 31, 1938	218,471.73	698.94
Year ending Dec. 31, 1939	505,777.47	1,407.85
Year ending Dec. 31, 1940	587,973.59	1,306.08
Totals	$1,740,839.77	$ 6,122.77

The payment of these inconsequential corporation taxes, when plaintiff is paying practically no corporation taxes elsewhere, can hardly be claimed to be arbitrary or confiscatory.

IV

The tax, though labeled a franchise tax, is really a tax on the use of tangible personal property and real estate in the State of Connecticut, and is constitutional.

The difficulty in this case, we believe, arises from the fact that the U. S. District Court and the plaintiff have incorrectly labeled the taxes here involved "franchise taxes". Since such a tax is levied for the privilege of doing business in a state, and The Spector Company did no business in the State of Connecticut, except an interstate business which was beyond the powers of the State to allow or not allow, it is argued that the tax is a direct burden on interstate commerce and therefore unconstitutional. The tax, however, is not solely a "franchise tax". That is only part of the story. It is true that the Conecticut Supreme Court of Errors said it was a "franchise tax" but that Court also said that the tax applies to The Spector Company because its income is derived from the use of tangible personal property and real estate in the State of Connecticut.

Spector Motor Service, Inc. v. *Walsh*, 135 Conn. 37, 70.

We claim that it is of the utmost importance in this case to consider the real nature of this tax and not the label which the legislature may have put on it. This Court has stated that the name of the tax is not important; it is the substance of the tax which controls it constitutionality.

Interstate Oil Pipe Line Co. v. *Stone*, 337 U. S. 662.
Memphis Natural Gas v. *Beeler*, 315 U. S. 649.
Peck v. Lowe, 247 U. S. 165.

The plaintiff in the Court below admitted that interstate

commerce may be taxed by a state on property physically located within the state although used exclusively in interstate commerce.

Postal Tel. Cable Co. v. *Adams*, 155 U. S. 688.

Plaintiff also admitted that a use and sales tax on such property, and a non-discriminatory income tax, were constitutional.

General Trading Co. v. *Tax Comm.*, 322 U. S. 335.
Joseph v. *Carter & Weeks Co.*, 330 U. S. 422.
Murdock v. *Penn.*, 319 U. S. 105, 115.

The Connecticut Special Tax Commission of 1933, which recommended the passage of the tax laws here involved, called it a "net earnings tax" and considered its constitutionality (See Appendix B, this brief). The legislature called it a "franchise tax" though no change was made in the basic principle of the tax as recommended by the commission. It is also known as a "corporation business tax". The taxing statute, however, under which the plaintiff was taxed, clearly states that it only applies to net income "when derived from the manufacture, sale or use of tangible personal or real property" located in Connecticut. (Sec. 420c, (3) (b), 1935 Supp. to General Statutes)

The essential characteristic of this tax as distinguished from a bare "franchise tax" is that it applies to The Spector Company, not only because it is a tax on its privilege to carry on business in Connecticut as a corporation, but also because it is using tangible personal property (pickup trucks, scales, hand trucks, platforms, etc.) and real estate (leased terminals) which are located or have a situs in Connecticut. This State is constantly guarding such property and giving it various types of protection. This property is not moving through the State in interstate commerce. It has come to rest and has acquired a permanent situs in this State. To tax the use of such property is an indirect tax on interstate commerce, which the settled law of this Court, by decisions too numerous to mention, allows a State to do.

It is true that, instead of levying an ad valorem tax on the use of such property, Connecticut has devised an ingenious scheme to tax the use of such property by measuring (by the use of three factors) the proportionate amount of taxpayer's business which the use of such property has created, and then levying a tax (here 2%) on such proportionate amount. We do not understand the plaintiff to claim that the allocation fraction works an injustice. The claim is made that the statute, in refusing a deduction of rent and interest from net income, works an undue hardship on the plaintiff. That claim is understandable when you consider that The Spector Company has divested itself of practically all income by paying a huge sum each year to The Wallace Transport Company as rent for its trucks. However, the reasons why rent and interest were not allowed as deductions are set forth in this brief later in Appendix C, and we claim they are cogent reasons and that the refusal of Connecticut to allow these deductions does not make the law arbitrary or unreasonable. The Connecticut Supreme Court of Errors found the non-allowance of these items to be reasonable and the parties should be bound by that decision. Furthermore, the Tax Commissioner did allow as a deduction 60% of the rent paid by The Spector Company as the cost of operating the trucks, and the Connecticut Supreme Court of Errors said that was correct as far as plaintiff was concerned (Page 69 of the Opinion). Certainly the plaintiff should have no objection to the disallowance of the 40% in view of the sound reasons advanced by Mr. Steege for the disallowance of this item. (Rec. reprint 75-80) The plaintiff did not offer any evidence to contradict Mr. Steege except that the plaintiff's trucks are heavier than the trucks upon which the 40% estimate was based and the tires wore out faster. We claim that such evidence is rather nebulous and not sufficient to overcome the positive testimony of Mr. Steege.

Besides, the Court will always construe a statute so as to uphold its validity where possible.

Anniston Manufacturing Co. v. *Davis*, 301 U. S. 337

Federal Trade Comm. v. *American Tobacco Co.*, 264 U. S. 298.

Blodgett v. *Holden*, 275 U. S. 142.

One who attacks a formula of apportionment carries a distinct burden of showing by clear and cogent evidence that it results in extraterritorial values being taxed.

Butler Bros. v. *McColgan*, 315 U. S. 501.

The plaintiff also claims that if this tax is repeated by the other states along its routes, it would cripple interstate business. We answer this claim as follows: *First*, by the use of the allocation fraction, even if all these states levied a similar tax, the total tax would not be more than a tax of 2% on the total net income of the company, excluding rent and interest. An income tax on net income is constitutional. *Second*, this tax can constitutionally be levied only in those states where the plaintiff has the same kind of terminal facilities as it has in Connecticut, because it is the use of the terminal facilities which enables the plaintiff to obtain business in the State. The states where these terminal facilities exist are few in number. If more terminal facilities are opened in other states, then the plaintiff will do more business and can afford to pay more tax. *Third*, since no other state has levied the same kind of tax as Connecticut, it is premature to state that if they did, an unwarranted burden would be placed on interstate commerce.

We claim that the Connecticut tax cannot be repeated by another state. Our tax is based only on business activity in the State of Connecticut. If another state had a similar tax, it would only be levied on the business originating in that state, and not on the Connecticut business. Thus the same company would be taxed, but on another phase of its business, and no double taxation of the same property would result.

Memphis Natural Gas. v. *Stone*, 335 U. S. 80.
Central Greyhound Lines v. *Mealey*, 334 U. S. 653.

Where the tax is fairly apportioned it is valid even if a similar tax is repeated by other states.

V

The judgment of the Circuit Court of Appeals should be sustained.

As pointed out by the Supreme Court of Connecticut, the genesis of the law involved in this case was the 1915 Act, which was tested and approved by the Supreme Court of Connecticut and of the United States.

> *Underwood Typewriter Co.* v. *Chamberlain*, 94 Conn. 47.
> Affirmed, 254 U. S. 113.

Spector Motor Service, Inc. v. *Walsh*, 135 Conn. 37, in discussing the 1915 Act involved in the Underwood Typewriter Co. case, supra, states at page 49 of the Opinion:

> "We shall later refer at some length to the basis of that allocation, but for our present purposes it is only necessary to note that the allocation in this case *(Underwood Typewriter Co. case)* could only be made by virtue of provisions beginning, 'when derived from the manufacture, sale or use of tangible personal or real property' in this state." (Italics ours)

On page 50 of the Opinion, when discussing the 1935 Act, the Connecticut Court says:

> "It is true that provisions for the allocation of income for taxing purposes are based upon the use of real or personal property in this state. The value of the plaintiff's personal property in this state is small and no value is placed in the finding upon its leaseholds. But obviously these were the means adopted by it for the successful operation of its business in this state, and no doubt they were of material service in producing the large proportion of the plaintiff's business which is attributable to Connecticut."

It is therefore obvious that the basis of the tax here in question is exactly the same as the basis of the 1915 tax act, viz: the use of tangible personal property or real estate in the state. The only change made in the 1935 tax act was the use of a slightly different formula in measuring the tax. Under the 1915 act the formula was

$$\frac{\text{Value of real estate and tangible personal property located in Connecticut}}{\text{Value of real estate and tangible personal property wherever located}} \times \text{Net income}$$

Under the 1935 act the formula is the average of the following three factors times the net income.

$$\left(\frac{\text{(1) Value of tangible property in Connecticut}}{\text{Value of tangible property wherever located}} + \frac{\text{(2) Wages of Connecticut employees}}{\text{Total wages of all employees}} + \frac{\text{(3) Gross receipts from Connecticut business}}{\text{Total gross receipts (excluding income from interest and dividends or capital gains)}}\right) \times \text{Net income (excluding rent and interest paid)}$$

We claim that since the basis of this tax has already been sustained by this Court in the Underwood Typewriter Co. case, supra, it is determinative of the present issue, except for the reasonableness of the new formula. Since the Connecticut Supreme Court has found it to be reasonable, and there is a valid reason for using the new formula to effect an equitable and fair dis-

tribution of the tax burden as heretofore pointed out in this brief and in Appendix B and C, and the amount of tax each year being a very small amount compared to the business done in Connecticut, the new basis of figuring the tax should not make the 1935 Act unconstitutional.

In a recent opinion of this Court, a state franchise tax is apparently sustained on business done by an interstate commerce corporation, which is not based on the use of tangible personal property or real estate located in the state.

Interstate Oil Pipe Line Co. v. *Stone*, 337 U. S. 662.

In this case, which was decided June 20, 1949, the plaintiff transported oil from its source in Mississippi to loading racks near a railroad where it was loaded on railroad cars and shipped out of the state. It was never intended to use this oil in intrastate commerce. The plaintiff also transported oil through pipe lines from its source in Mississippi directly out of the state without a stop at a railroad siding. The state did not attempt to tax this operation but did tax the business of transporting the oil to the siding on the theory that this was intrastate business and not interstate commerce. In sustaining the tax, this Court held: (1) Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax; (2) The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character; (3) Even if this business is interstate commerce, Mississippi has the power to impose this tax; (4) There is no attempt to tax interstate activity carried on outside of Mississippi; (5) No other state can repeat the tax. All of these conditions are present in the Connecticut tax act, and the act should be sustained on the basis of this decision.

In a recent well-reasoned decision, the rule is laid down that interstate commerce may be taxed by a state provided it is not called upon to pay too much or too often.

Martin Ship Service Co. v. *Los Angeles*, 34 Cal. (2nd) 793, 215 Pac. (2nd) 24.

Certainly the tax in the instant case is not a crippling exaction and, because it is apportioned, its constitutionality cannot be questioned.

We recommend for the consideration of this Court both of the learned opinions handed down by the Circuit Court of Appeals in this case. Perhaps the Circuit Court should have concluded that the tax was constitutional because it is based, as we claim, on the use of tangible personal property or real estate in the State of Connecticut. The Court felt it was more an income tax than anything else, but the following language from the opinion is very apt, viz:

> "Emphasis upon substance and a wariness as to labels is especially necessary as to a state tax termed an excise upon the privilege of doing business within the state. It is an easy slide from this to the thought that what is taxed is 'the franchise to operate in interstate commerce,' an 'exaction for a privilege no state has power to grant' as even the learned trial judge here puts it. This we venture to suggest is a pervasion of the thought behind the label. What the state wants is no exaction for interstate operations, but a fair return for what the state gives. The tax would certainly be the same under various other labels x x x." (Rec. reprint 204)

Conclusion

We respectfully claim that the judgment of the Circuit Court of Appeals be affirmed. We make no claim here that this Court has no jurisdiction to decide this matter.

Respectfully submitted,

RESPONDENT

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APPENDIX A

Section 418c, 1935 Supplement to the General Statutes:

Sec. 418c as amended by Sec. 255d, 1937 Supp. Imposition of tax. Every mutual savings bank, savings and loan association and building and loan association doing business in this state, and every other corporation or association carrying on *or having the right to carry on* business in this state which is required to report to the collector of internal revenue for the district in which such corporation or association has its principal place of business for the purpose of assessment, collection and payment of an income tax, except (1) insurance companies, (2) companies principally engaged in the transportation and communication business and subject to the gross earnings taxes under chapters 70, 71, and 72, (3) companies principally engaged in manufacturing, selling or distributing gas, electricity or water and subject to the gross earnings tax imposed under chapter 73 and (4) companies all of whose properties in this state are operated by companies subject to taxation under chapter 70, 71, 72 and 73, shall pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state, such tax to be measured by the entire net income as herein defined received by such corporation or association from business transacted within the state during the income year and to be assessed at the rate of two per cent; provided in no case shall the tax be less than the minimum tax as computed under section 421c and provided, when any company taxable under chapter 71 shall engage in any business in this state other than the carrying of passengers for hire in common carrier motor vehicles, such company shall be subject to a tax of two per cent measured by that portion of its total net income derived from such business but shall not be subject to the minimum tax computed under section 421c. Notwithstanding any other provisions of this chapter, any mutual savings bank owning, at the end of the income year, real estate acquired for debt having an assessed valuation of ten per cent or more of its total assets shall, during the calendar years 1936 and 1937, be subject to the lesser of (1) the tax imposed by this chapter

and (2) the tax imposed by chapter 68 as amended by section 355b of the 1933 supplement. (Italics added in 1937)

Section 419c, 1935 Supplement to the General Statutes:

Sec. 419c. Deductions from gross income. In arriving at net income as defined in section 417c whether or not the taxpayer is taxable under the federal corporation net income tax, there shall be deducted from gross income all items deductible under the federal corporation net income tax law, effective and in force on the last day of the income year, except (1) federal taxes on income or profits, losses of prior years, interest received from federal, state and local government securities and specific exemptions, if any such deductions shall be allowed by the federal government and (2) interest and rent paid during the income year.

Section 420c, 1935 Supplement to the General Statutes:

Sec. 420c. Allocation of net income. If the trade or business of the taxpaper shall be carried on partly without the state, the business tax shall be imposed on a base which reasonably represents the proportion of the trade or business carried on within the state. The allocation of the base of the tax measured by net income shall be made on the following basis: (1) Interest, dividends, royalties and gains from sales of intangible assets, less related expenses, when received by a company having its principal place of business within the state, shall be allocated to the state and, when received by a company having its principal place of business without the state, shall be allocated without the state; provided, when it can be clearly established that such income is received in connection with business within the state, such income shall be allocated to the state without regard to the location of the principal place of business of the taxpayer, and a similar rule shall apply to such income received in connection with business without the state; (2) gains from sales or rentals of tangible capital assets held, owned or used in connection with the trade or business of the taxpayer but not for sale or for rent in the regular course of business shall be allocated to the state if the property sold or rented be situated in the state prior to the sale or during the

rental thereof, otherwise such gains shall be allocated outside the state; (3) net income of the above classes having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows: (a) Such income, when derived from business other than the manufacture, sale or use of tangible personal or real property, shall be specifically allocated within and without the state under rules and regulations of the tax commissioner; (b) when derived from the manufacture, sale or use of tangible personal or real property, the portion thereof attributable to business within the state shall be determined by means of an allocation fraction to be computed as the simple arithmetical mean of three fractions. The first of these fractions shall represent that part of the average monthly fair cash value of the total tangible property held and owned by the taxpayer during the income year which is held within the state, without deduction on account of any incumbrance thereon but excluding any property the income of which is separately allocated under the foregoing provisions of this chapter. The second fraction shall represent the part of the total wages, salaries and other compensation to employees paid by the taxpayer during the income year from offices, agencies or places of business within the state, provided all such payments shall be assigned to the office, agency or place of business of the taxpayer at which the employee chiefly works or from which he is sent out or with which he is chiefly connected. The third fraction shall represent the part of the taxpayer's gross receipts from sales or other sources during the income year, excluding any income which is specifically allocated under subdivisions (1) and (2) of this section, which is assignable to offices, agencies or places of business within the state, provided such receipts shall be assigned to that office, agency or place of business at or from which the transactions giving rise thereto are chiefly originated and completed.

APPENDIX B

Report of the Connecticut Temporary Commission to Study the Tax Laws of the State and to Make Recommendations Concerning Their Revision (as provided by Special Act No. 474 of 1933 and submitted to the Governor of Connecticut on November 9, 1934).

At page 56:

SUMMARY OF STATE EXPENDITURES.

"From 75 to 80 per cent of all state expenditures from 1927-28 to 1932-33 were made for highways, charities and corrections, and education. Highways required from 33 to 47 per cent of all state expenditures; charities and corrections, from 20 to 32 per cent; and education, from 12 to 14 per cent. All other state functions, consisting of general government, protection of persons and property, development and conservation of natural resources, conservation of health and sanitation, public parks, interest, and miscellaneous, accounted for less than 25 per cent of all state expenditures."

At pages 454-456:

ALLOCATION OF NET INCOME.

"The apportionment of net income is one of the principal problems which has been faced by the tax commissioner in the administration of the law. The courts have held that apportionment of net income between the several states in which a taxpayer does business must be reasonable and equitable.[15] An arbitrary allocation fraction will be sustained in the absence of convincing evidence as to its unreasonable effect. With the 1933 amendment to the Connecticut statutes, requiring the use of separate accounting in certain cases in the allocation process, the law has been rendered much less vulnerable than it formerly was. But the danger now is that this allocation method will be demanded by taxpayers whose cost accounting systems are not sufficiently accurate to warrant its

[15] Harris Rees' Sons v. State of North Carolina, 283 U. S. 123 (1931).

use. The tax commissioner is left with only the vaguest sort of authority to pass upon the accuracy of such systems.

"When the taxpayer is unable to qualify for allocation by the separate accounting method, its income is allocated by formulas which differ from those in use in any other state. This means that the corporation doing business within and without this state is taxed upon more or less than 100 per cent of its net income in all but the most unusual cases.

A BROADER CONCEPT OF NET INCOME.

DENYING DEDUCTIONS FOR INTEREST AND RENTAL PAYMENTS.

"A business tax should not depend upon the financial organization of a corporation but rather upon the amount of business done. This is not related to the amount of capital invested by stockholders or the equity of stockholders in the assets of the corporation but rather to the amount of capital used in the business whether borrowed or contributed by stockholders. To satisfy this requirement, it is necessary to redefine net income so as to include payments and accruals to the credit of all contributors of capital—that is, rental and interest payments and accruals as well as net profits.

"It has been shown that only by such a definition of net income can the tax contributions of banks be maintained at somewhere near their former level by means of a valid tax and without substantially increasing the burden of taxes upon other corporations to which the net income or franchise tax upon national banks is tied by the provisions of section 5219 of the federal statues. But whatever the disposition by the General Assembly of our recommendations for the taxation of banks, we are convinced that the changes which we are proposing at this point in the base of the tax upon miscellaneous corporations will make for a more equitable distribution of the tax burden among these corporations and will at the same time introduce a stabilizing factor into the tax base which will be of great value in itself.

"Such modification, however, raises two questions: Will such a tax be interpreted as a burden upon interstate commerce? Will the apportionment of net earnings between states by means of arbitrary allocation fractions be held unreasonable?

"These questions may be clarified by considering the fact that the returns realized by stockholders upon their investments in a corporation are somewhat analogous to the returns realized by bondholders and lessors. It has long been recognized that stockholders' net income consists not only of fortuitous gains but also of implicit (i.e., non-contractual) interest and rent upon the investment of stockholders.

"It is generally conceded that a tax cannot be imposed upon gross receipts from interstate commerce.[15] On the other hand, it is equally well established that a net income tax can extend to profits from interstate commerce.[16] The base rather than the rate of the tax is thus established as a determining factor in questions of interpretation of the interstate commerce clause. The dicta of the court in the decisions which it has rendered on this score cannot be interpreted too literally. It is obvious that a net income tax so heavy as to encroach severely upon the normal profits of a concern may discourage interstate commerce more effectively than a moderate gross income tax. The probability is that the court would give some consideration to the burden if faced with cases involving extreme rates. But there is no probability that such rates will be imposed by this state. The only question then is the interpretation which the courts will place upon a tax base of the type under consideration.

"There is, so far as we are aware, only one decision in which the Supreme Court has ruled upon a net earnings tax. In the case of Atlantic Coast Line Railroad Co. v. Doughton (262 U. S. 413) previously cited, one of the points at issue was the burden imposed upon interstate commerce by a net income tax which,

[15] Crew Levick Co. v. Commonwealth of Pennsylvania, 245 U. S. 292 (1917).

[16] U. S. Glue Co. v. Oak Creek, 247 U. S. 321 (1918).

in the case of railroads and other public utility companies, was imposed upon a base consisting of interest and rental payments as well as net profits. The tax was upheld by the court.

"We conclude that a net earnings tax could be extended to earnings from interstate commerce because, as far as the burden imposed by it is concerned, there is no fundamental difference between such a tax and a net income tax of the ordinary type, and because such a tax has been specifically upheld by the United States Supreme Court.

"The allocation of net earnings would, we believe, constitute no obstacle to the enforcement of a net income tax framed along these lines. Gross receipts can be allocated with less difficulty than net income among the states in which business is conducted. So too can such expenses as raw materials, wages, insurance, etc. But such overhead costs as interest on indebtedness and salaries can be apportioned among the several states only upon some arbitrary basis. Hence, the fewer such deductions, the simpler becomes the allocation by a separate accounting process.

"The allocation by means of an arbitrary apportionment fraction would, of course, continue to be the common practice, but since there is no fundamental difference, as far as the geographic source of income is concerned, between income which is earned for stockholders and income which is earned for creditors and lessors, there is no reason why an apportionment fraction which will be sustained for an ordinary net income tax will not also be sustained for a net earnings tax. It may be noted that the Atlantic Coast Line case arose over a tax which was apportioned according to the ratio of mileage within and without the state of North Carolina and that the tax was not attacked upon this point." (Parenthetical matter ours).

APPENDIX C

THE INTENT OF THE SPECIAL TAX COMMISSION

The special tax commission believed that any corporation having sufficient net earnings should pay a business tax equivalent to 2% of its net earnings from Connecticut business in the event that such net earnings tax would be in excess of the minimum tax. It should be emphasized that this part of the new corporation business tax was measured by net earnings and not by net income. The net earnings of a corporation may be said to be equivalent to the sum of its net income and of the interest on borrowed money and rent on leased real estate which may have been paid by it. The special tax commission pointed out that a business tax should not depend upon the manner of the financial organization of a corporation but rather upon the amount of business done by it. The volume of business carried on by any corporation is not related to the amount of money invested by its stockholders themselves or to the equity of its stockholders in its assets, but rather in the aggregate amount of capital used in the business of that corporation whether that capital be borrowed, rented or contributed by its stockholders.

In order to be as fair and equitable as possible to all corporations a franchise tax for the privilege of carrying on business should be measured by the net earnings of each corporation. An example will illustrate. Four corporations decide to engage in the same kind of business. All have high-grade managership of equal calibre. Corporation A, however, obtains all of its capital of $1,000,000 to be used in its business from its stockholders alone. Of the amount so obtained, $500,000 is used in the purchase of land and the construction of a factory thereon; $300,000 is used in the purchase of machinery; and $200,000 in the purchase of raw material. At the end of the first year this corporation has net earnings of $100,000. This amount is also the same as its net income since it has no expenditures for interest on borrowed money or rent on real estate leased by it.

Corporation B obtains $500,000 from its stockholders, and $500,000 from the issuance of 4% bonds. Since it also has $1,000,000 with which to carry on its business, it is able to construct the same size plant, install the same type of machinery, and have the same amount of raw material as Corporation A. At the end of the first year Corporation B also has net earnings of $100,000. Since, however, it has to pay $20,000 to its bondholders, its net income amounts to only $80,000.

Corporation C obtains $500,000 paid-up capital stock from its shareholders, and instead of buying land and erecting its own factory, it decides to rent real estate having a valuation of $500,000 in which it installs machinery worth $300,000 and also has $200,000 to be used in the purchase of raw material. Corporation C also has $1,000,000 to work with, and also has net earnings at the end of the first year of $100,000. Because, however, it has to pay $50,000 rent for its leased real estate, its net income is only $50,000.

Corporation D is only able to raise $200,000 from its stockholders. It rents real estate, however, valued at $500,000 and also rents machinery placed in that factory of a value of $300,000. Since it also has a capital of $1,000,000 with which to work it is able at the end of the first year to have $100,000 in net earnings. Because, however, it has to pay $50,000 in rent on leased real estate and $30,000 in rent on rented machinery, its net income is only $20,000.

Since it is the purpose of the net earnings tax base of the present Connecticut corporation business tax act to measure that tax by the amount of business done by each corporation, all four corporations in the example illustrated will pay the same amount of tax. This is as it should be since each has the use of the same amount of capital and each carries on the identical volume of business.

In order to achieve this purpose, however, it is necessary to add to the net income which any corporation may have enjoyed, all amounts which may have been paid by it in rent for the use of leased real estate and of tangible personal property, and in interest payments on borrowed money.

It will be seen that there would have been discrimination against Corporation A in the event that it had been required to pay a corporation business tax of $2,000 while its competitor B had to pay a tax of $1,600; its competitor C, a tax of $1,000; and its competitor D, a tax of only $400.

Relative to depreciation the theory behind the present law will not warrant the non-deductibility of charge-offs for depreciation. What the special tax commission had in mind was the use of capital, not the consumption of capital.

If charge-offs were not allowed as a deduction there would be discrimination between the corporation owning real estate and the corporation renting real estate. This is due to the fact that unless the owner of the building which is leased to the corporation keeps that building entirely up to date, he will be forced to reduce his rent or to lose his tenant. In order to avoid this he will sooner or later have to spend capital which may be roughly equivalent to depreciation which has been taken on the building. If this is true, it would appear that a corporation which owns its own real estate should be given the privilege of deduction of legitimate charge-offs for depreciation.

There is a fundamental distinction between the consumption of capital and the current use of capital.

The members of and advisors to the special tax commission who went painstakingly into the economic theory behind the present law came to the conclusion that in their essence there is no fundamental distinction between interest and rent. One merges into the other.

Theoretically it should make no difference as to whether the corporation borrows $500,000 through the issuance of 4% bonds and itself erects its factory plant from such borrowed money, or whether that corporation borrows no money, but rents a factory plant having a value of $500,000. In the one case the corporation pays interest, and in the other case it pays rent. If the corporation which borrows $500,000 and puts up its own plant is not careful to set up proper reserves for depreciation to take care of the consumption of the plant erected by it, the day will inevitably arrive when its plant will be

valueless, and it will still owe $500,000. On the other hand if the landlord of the corporation which rents real estate does not take care to see that the real estate originally worth $500,000 is properly kept up in every particular and replacements are made for deterioration, depreciation and obsolescence, the corporation so renting will in time either give up its lease, or see to it that the rent paid by it is commensurate with the decreased value of the rented real estate.

In order to be fair to both corporations, although no allowance should be made for the deduction of rent or interest paid by the corporation, legitimate depreciation charge-offs in the case of a corporation owning its own plant should be allowed.

So far as is known there is no state in the union at the present time which has so painstakingly attempted to establish justice and equity as between all corporations in the levy of corporation business taxes as has Connecticut. At the same time a fair income is assured for the state.